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MILITARY FORCE AND JURISDICTION

IN TROUBLOUS TIMES.

BY

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UNITED SERVICE INSTITUTION OF INDIA
Acc. No. M-4066
Dated 23-8-87

U 1199 XIII
2/2/89

LONDON: CHAPMAN AND HALL

LIMITED

1886

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RICHARD CLAY & SONS,
BUNGAY,
and Bread Street Hill, London.

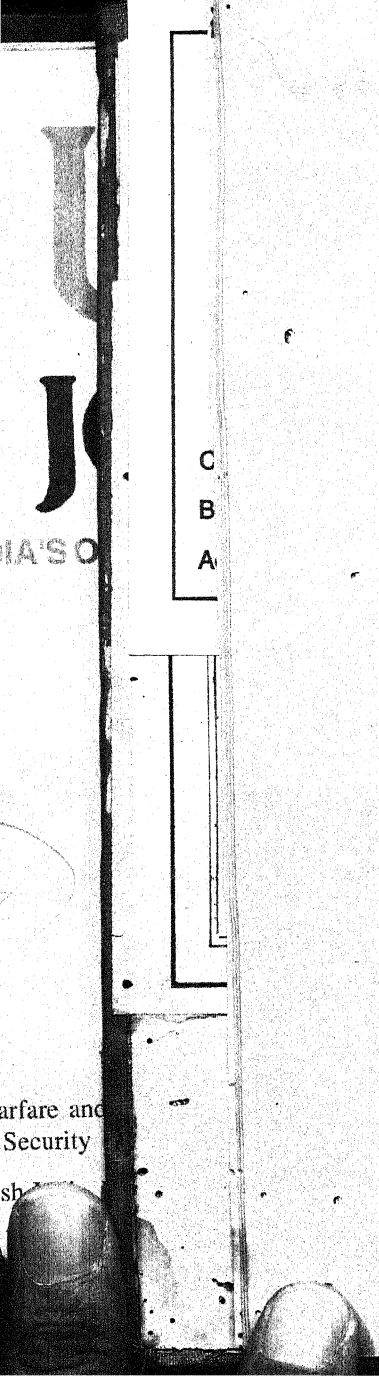
PREFACE.

WHILE instructing himself in the subjects dealt with in this book, preparatory to instructing others, the Author found that the process required the expenditure of a vast amount of time and trouble; partly owing to the desultory manner in which the subjects were treated, and partly from the fact that the required information was spread over many volumes.

In the present day, with the pressure under which work is mostly carried on, those employed in business or duty should have the information they require for study or reference placed within their reach in such a form as to be easily accessible.

If this book accomplishes this, as regards the important subjects of which it treats, the Author will have gained the object for which it has been written.

It has been thought better to keep the chapters respecting the Custom of War entirely separate from those on Martial Law, with a separate Index and Table of Contents.



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MARTIAL LAW.

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American Instructions.	Instructions issued for the Commanders of the United States' Armies by the Government in 1863.
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Brussels Conference.	Proceedings of International Military Conference held at Brussels in 1874; Parliamentary Blue-Book. 1875.
Clode, M. F.	Military Forces of the Crown, by C. M. Clode, Esq., Barrister-at-Law. 1869.
Clode, M. and M. L.	Military and Martial Law, by C. M. Clode, Esq., Barrister at Law. 1872.
Finlason.	A Treatise on Martial Law, by W. F. Finlason, Esq., Barrister at Law. 1866.
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Farrer.	Military Manners and Customs, by J. A. Farrer. 1885.
Franco-Prussian War.	Franco-Prussian War, edited by Capt. Hozier.
French Instructions.	Instructions en cas de Troubles. 1883.
French Manual. ...	Manuel de Droit International. 1884.
Halleck.	Halleck's International Law, edited by Sir Sherston Baker.
Hough.	Practice of Courts-martial, by Captain Hough. 1825.
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M.	Manual of Military Law; official.
Q.	The Queen's Regulations and Orders for the Army.
Simmons.	Constitutions and Practice of Courts-martial. 1875.
Thring.	Sir H. Thring on the Law of Insurrection, in the Manual of Military Law.
Thring.	Sir H. Thring on the Customs of War, in the Manual of Military Law.
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INTRODUCTION.

UNDER the general head of Martial Law are here treated, the use of military force in aid of the Civil Power in times of comparatively slight disturbance, its employment to replace the Civil Power when the ordinary law is overwhelmed by war or insurrection, and also those occasions on which emergent circumstances call for the immediate and summary use of military force.

The law governing the use of military force on the occasions referred to, within the British Empire, is by no means clearly laid down. No Statute Law exists on the subject, and its recognition by the Common Law is only indirect.

It has been endeavoured in the following pages to gather the acknowledged authorities on each aspect of the question together, and to give such illustrations by instances and cases as could be found. The author has throughout been filled with a sense of the worthlessness of his own individual opinions on these subjects for any practical purpose, and has consequently confined himself almost entirely to quoting those persons whose opinions necessarily carry weight. Where opinions are not actual quotations care has been taken that they are based on good authority.

This method of treating the subject necessarily results in a composition of a somewhat patchwork nature, but when it is of so great importance that the principles enunciated should be correct, manner must necessarily be subservient to matter.

It is impossible to study the subject of the application of military force to suppress disturbance within the British Empire without being forcibly struck by the vagueness and want of clearness which surrounds it, and which is specially noticeable in two points. One of these is the relative responsibility of the magistracy and the military when the latter are called out to aid the former in restoring order. Under the present law the military are held responsible, and can be called to account, although their action has been taken at the express demand of the magistrate; while, on the other hand, they may be tried and punished for neglect of duty by court-martial for not acting when necessary, even if they are not called on to do so by the Civil Power.

Further, the private soldier is held personally responsible for the effect of his fire, although he fires under the direct order of his officer.

The study of the record of the Gordon, Bristol, and other riots does not display this curious state of things as leading to happy results.

The gross unfairness of the present law as regards both officers and soldiers has been strongly remarked on by Sir Charles Napier and others. It appears to have been developed during a time when the people, and even Parliament, distrusted the army as a force not in their own power, and which they feared might be used against the liberties of the nation. The state of affairs at present is very different, and the army may now justly claim to be more fairly treated. Let the Civil Power be responsible for deciding when the military are to act, and what objects they are to effect. Let the officer be responsible for carrying out the object he has been directed to attain, and let the private soldier be covered by the responsibility of the officer whose command he obeys.

Clearly defined responsibility is the necessary basis of

efficient and combined action, and the want of it may, in the future, as in the past, be the cause of delay and hesitation at critical moments, resulting in unnecessary bloodshed and destruction of property.

The other point in which greater definition is required is the mode of applying and administering martial law when occasion arises for its use. The history of the past clearly shows that the excesses committed under martial law might have been largely, if not altogether, prevented had clear instructions been in existence defining its scope. All authorities agree that instructions of this sort are essential to prevent excess. Their preparation cannot be left to the occasions when they are required, there is then, as a rule, no time to prepare them, nor are men's minds then in a sufficiently calm state to be fitted to draw them out; they should be prepared at leisure in time of quiet, and issued as standing instructions under authority, care being taken that while preventing excess, nothing is done to restrain the prompt and effective measures necessary in times of disorder.

CHAPTER I.

MILITARY FORCE IN AID OF THE CIVIL POWER.

1 When the maintenance of the public peace is threatened by a force beyond the power of the Civil Magistrate to disperse by the police, the aid of the military is called in.

The circumstances under which such aid can be called in, and the conditions under which the military power, when called in, may be used, are laid down by the Civil Law concerning riot and insurrection.

The regulations governing the military when called out are contained in the Queen's Regulations, Section viii. part iv.

THE DUTY OF MAINTAINING THE PUBLIC PEACE RESTS ON ALL CITIZENS.

2 By the Statute Law of England the duty of maintaining the public peace is thrown on the Civil Power. A single Justice may arrest, or authorize others to arrest, persons riotously assembled, and every man is bound in such case to assist the Magistrate.

1. "It is not," said the late Chief Justice Tindal, "left to the choice or will of the subject—as some have erroneously supposed—to attend or not to the call of the Magistrate, as he may think proper; but every man is bound, when called upon, under pain of fine and imprisonment, to yield a ready

and implicit obedience to the call of the Magistrate, and to do his utmost to assist him to suppress any tumultuous assembly." (*Clode, M. F.*, xvii. 6.)

2. "Every Sheriff, Constable, and other Peace Officer is called upon to do all that in him lies for the suppression of riot, and each has authority to command all other subjects to assist him in that undertaking." (*Clode, M. F.*, xvii. 3.)

3 Not only is it the duty of every subject to answer the call of the Magistrate to assist him, but he is also bound individually to take every means in his power to suppress riot, even when not so called upon.

1. "By the Common Law, every private person may lawfully endeavour, of his own authority, and without any warrant or sanction of the Magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he shall see coming up from joining the rest; and not only has he the authority, but it is his bounden duty, as a good subject of the Crown, to perform this to the utmost of his ability." (*Clode, M. F.*, xvii. 3.)

THE USE OF ARMS TO SUPPRESS DISTURBANCE.

4 A resolution of all the Judges has laid down that "any Justices of the Peace, Sheriff, or other Magistrates, or *any other subjects*, may arm themselves to suppress riots, rebellions, or resist enemies, endeavouring themselves to suppress such disturbers of the peace." But the resolution added a suggestion that "the most discreet way was for every one to attend and assist the Justices in such case, or other ministers of the King" in doing their duty. (*Clode, M. F.*, xvii. 4.)

DUTY OF THE MILITARY TO ASSIST THE CIVIL POWER.

5 Her Majesty, or those who represent her, or are authorized by her, may order the troops to assist the Civil Magistrates, and the troops are bound to obey such order, and act when so employed as a military body subject to discipline.

1. As armed rebels and armed rioters are included in the expression "enemy" as used in the Army Act (*A.* 190, 20), officers or soldiers are liable, when called out to act against them, as if they were on active service. (*A.* 189, 1.)
2. In 1796 the Wilts Militia were called upon to assist the Excise authorities and the Magistrates, and a correspondence subsequently arose as to the power to call in military aid. Lords Elden and Redesdale in their legal opinions stated as follows:
3. "We conceive His Majesty may by orders given to his troops make assistance to the Civil Magistrate, in the lawful execution of his civil duty, a part of their military duty; that the troops acting at the requisition of the Magistrate in obedience to such orders would still be subject to military discipline, and would therefore act as a military body, commanded by military officers; and that the orders of the Civil Magistrate would not warrant them in disobedience to the orders of their military commanders, acting in discharge of their military duties." (*Clode, M. F.*, App. CII. 21.)

6 The Queen's Regulations lay down that no officer is to take out troops for the purpose of aiding in the suppression of riot, the maintenance of the public peace, or the execution of the law, except upon the requisition, in writing, of a Magistrate, or in cases of *great and sudden emergency;* nor are troops to be sent to assist the civil force in case of *expected* riots, except upon the written requisition of Lord-Lieutenants, Sheriffs, or a Magistrate or Magistrates having jurisdiction in the place where a riot is expected, or in case of emergency, on the receipt of a telegram from such authorities. (*Q.* viii. 93.)

1. When troops are called out in aid of the Civil Power at home the officer commanding the station is to report the same by telegraph to the Adjutant-General; and the officer commanding the party is to report daily in writing to the same. (*Q.* viii. 92.)
2. Should convicts show a disposition to mutiny, or in other cases of emergency, temporary assistance is to be rendered by officers commanding stations and corps on the requisition of governor of convict prisons in the neighbourhood, report being made to the Adjutant-General. (*Q.* viii. 102.)
3. The French law requires that the requisition addressed to officers by the Civil authorities, when calling on the troops for assistance, should be in the following form.

   We —— require, by virtue of the law, N ——, Commanding ——, &c., to lend the assistance of the troops of the line (national gendarmerie or national guard), necessary for ————. For the assurance of the said commandant or commandants, we attach our signature.

   Signature ————.
4. The French instructions direct that the requisitions should state clearly the end to be attained, leaving to the military commander the choice of the means by which to attain it, after arranging, as far as possible, with the Civil authorities who made the requisition.

   In case of flagrant outrage and of emergency, a written requisition, or consultation with the Civil authority, need not be waited for. The commander of the troops takes such measures as he may judge necessary to disperse gatherings and repress attack. (*Instruction en cas de Troubles*, p. 26.)

7 In addition to their duty as soldiers to aid the Civil Power when so ordered by superior military authorities, all military men retain their duty as citizens to give *individual* help to the Civil authorities in maintaining the public peace.

1. "The soldier is still a citizen, lying under the same obligation, and invested with the same authority to preserve the peace of the king, as any other subject. If the one is

bound to attend the call of the Civil Magistrate, so also is the other; if the one may interfere for that purpose when the occasion demands it, without the requisition of the Magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion, which requires the private subject to act in subordination to, and in aid of, the Magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a still stronger degree with a Military Force."

2. "In extreme cases, where the danger is pressing and immediate, when a felony has actually been committed, or cannot otherwise be prevented, and from the circumstances of the case no opportunity is offered of obtaining a requisition from the proper authorities—the military, like the Civil subjects of the King, not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people." (*Clode, M. F.*, xvii. 15.)

3. Again, Sir James Mansfield said,—

"If it is necessary for the purpose of preventing mischief, or for the execution of the law, it is not only the right of soldiers, but it is their duty to exert themselves in assisting the execution of a legal process, or to prevent any crime or mischief being committed." (*Clode, M. F.*, xvii. 49.)

POWER OF THE MAGISTRATE TO CALL FOR MILITARY ASSISTANCE.

8 Every Magistrate has authority to command *all* subjects to assist him in the suppression of riot, and has also authority to call in military assistance when he thinks it necessary.

1. Lords Elden and Redesdale in 1796 stated in their report to the Duke of Portland concerning the riots in the West of England,—

"We apprehend that the Civil Magistrates have the same power to call for the assistance of the military as they

have to call for the assistance of others of His Majesty's subjects. But we apprehend the Magistrates have no power to call for the assistance of the military in cases in which they cannot call for the assistance of other of His Majesty's subjects." They added,—

"We apprehend the Magistrates cannot require from the military any assistance repugnant to the obligations of their military duty, such as to march from that part of the country in which they are stationed by their military orders, to another part of the country to which their military orders do not direct or authorize them to go." (*Clode, M. F.*, App. CII. 18.)

CIRCUMSTANCES CALLING FOR MILITARY AID.

9 The use of military force can only be justifiable where the maintenance of order is impossible by the Civil Power alone, and this condition can only arise when the display of resistance is greater than can be dealt with by the ordinary police, in other words, when there are a number of persons met together sufficient to defy the law.

Here it must be remembered that the mere gathering together of people is no crime in the eye of the law.

1. "There is no doubt that the people of this country have a perfect right to meet for the purpose of stating what are, or even what they consider to be, their grievances; that right they always have had and I trust always will have; but in order to transmit that right unimpaired to posterity, it is necessary that it should be regulated by law and restrained by reason." (*Baron Alderson in R.* v. *Vincent.*)

UNLAWFUL ASSEMBLY.

10 Where, however, great numbers of people assemble with such circumstances of terror as cannot but endanger the public peace, and cause fears and jealousies amongst the Queen's subjects, such meeting becomes an *unlawful assembly*.

1. Take as an instance an occasion where great numbers complaining of a common grievance meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests. In such case no one can foresee what may result from such an assembly.

11 The commission of an act of violence by one or more of those assembled is not necessary to make the assembly unlawful, if its character and circumstances are such as to be calculated to alarm, not only foolish or timid persons, but persons of reasonable firmness and courage.

"*If the persons who assemble together say, 'We will have what we want whether it be according to law or not,' a meeting for such a purpose, however it may be masked, if it be really for a purpose of that kind, is illegal.*" (*Mr. Justice Bayley as cited by Baron Alderson.*)

1. *Example.*—A Chartist meeting at Newport in 1839, three hundred to one thousand persons assembled. Evidence was given that the speakers endeavoured to incite the people to disaffection and to the use of physical force. No actual outrage was perpetrated, but numbers of persons armed with sticks were proved to have marched in procession, and several witnesses swore that they apprehended danger both to life and property. This assembly was held to be unlawful. (*R.* v. *Vincent.*)

RIOT.

12 A *riot* is a tumultuous disturbance of the peace by three or more persons, assembling together of their own authority, with an intent mutually to assist one another against any who oppose them, in the execution of some enterprise *of a private nature, and afterwards actually executing the same* in a violent and turbulent manner to the terror of the people. It is immaterial whether the act done be unlawful

or not, but there must be an act. Doing the act in a manner calculated to inspire people with terror is punishable, whether it be lawful or unlawful; but when the object of the assembly is lawful, it requires far stronger evidence of the terror caused by the means used to induce a jury to return a verdict of guilty than if the object were unlawful.

1. *Example.* Persons assembling together on a racecourse and tumultuously pulling down a booth, or gathering together in a tumultuous manner and breaking threshing-machines, are guilty of a riot.

   Pulling down an enclosure which has been illegally put up, if accompanied by circumstances of actual force or violence calculated to inspire people with terror, will be a riot. If not accompanied by such circumstances, such an assembly can never be deemed a riot. (*Thring.*)

INSURRECTION.

13 An *insurrection* differs from a riot in that a riot has in view some enterprise of a private nature, while an insurrection contemplates some enterprise of a *general and public nature*, savouring of high treason, involving an intention to levy war against the Queen, as it is technically called, or otherwise to act in general defiance of the Government of the country.

1. *Example.* The pulling down or burning of the cotton mill of an obnoxious mill-owner is a *riot.*

   Attacking a barracks or seizing a store of arms with a view to arm themselves and make war against the Government would be an act of *insurrection.* (*Thring.*)

14 It will be seen from the above that an unlawful assembly and a riot are different stages of the crime of insurrection.

An unlawful assembly is an assembly which may reasonably be apprehended to endanger the public peace.

As soon as an act of violence is perpetrated it becomes a riot. If the act of violence be of a public nature, and with the intention of carrying into effect any general political purpose, it becomes an insurrection or rebellion and not a riot.

LIABILITY TO PUNISHMENT.

15 Partaking in an *unlawful assembly* is considered by the law as a misdemeanour punishable by fine, imprisonment without hard labour, or by both.

1. Partaking in a *riot* is considered by the law as a misdemeanour punishable by fine, imprisonment with hard labour, or by both, but rioters remaining after the Riot Act has been read an hour become felons, and can be punished by penal servitude.
2. *Insurrection* is considered by the law as the gravest political crime an English subject can commit, and is punishable as treason capitally. All persons present at the commission of such crimes are equally principals in their commission, but practically the extreme punishment is only awarded to the leaders.

AMOUNT OF FORCE WHICH MAY BE USED TO SUPPRESS DISTURBANCE.

16 No positive rule can be laid down as to the degree of force which may be used to suppress an *unlawful assembly*, but the principle is that so much only is to be used as is sufficient to effect the dispersion of the assembly.

17 In the suppression of a *riot* there is no doubt that a person lawfully engaged in trying to apprehend a rioter is justified in using any degree of force to protect himself or to overcome resistance.

1. For the suppression of a *riot* every magistrate, sheriff, constable, and other police officer is required to do all that in him lies, and each has authority to command all other subjects of the Queen to assist him in that undertaking. If the riot is general and dangerous every subject may arm himself against the evil-doers to keep the peace. It is more discreet when possible for every one to attend to assist the magistrates, but if the occasion demands immediate action, and no opportunity was given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself and upon his own responsibility, and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the Common Law.

18 The firing on a mob can only be excused by the necessity of self-protection, or by the circumstances of the force at the disposal of the authorities being so small that the commission of some felonious outrage, such as the burning of a mill, or the breaking open of a prison, or the attacking of a barrack, cannot be otherwise prevented. (*Thring.*)

1. In the Six Mile Bridge riots at the County Clare election in 1852, an escort of two officers, two sergeants, and forty rank and file, employed to protect voters going to poll, were attacked and stoned by the mob. The soldiers fired without orders from their officers, but, as was subsequently sworn by the commanding officer, *in defence of their own lives*, and killed two or three of the mob. Indictments were preferred against those who fired, but the bills were thrown out by the grand jury.

19 For the suppression of an *insurrection* the use of arms may be resorted to as soon as the intention of the insurgents to carry their purposes by force is shown by open acts of violence, and it becomes apparent that immediate action is necessary.

EFFECT OF READING THE RIOT ACT.

20 Persons remaining one hour after the proclamation may, by section 3 of the Riot Act, be seized and apprehended by any justice or persons assisting him; the justices, constables, and persons assisting being fully indemnified from any killing, maiming, or hurting done in the dispersion or apprehending. (*Thring.*)

1. In the Lord George Gordon riots the mob were allowed to proceed to great excesses without any interference by the civil or military authorities; and this appears to have been allowed under the impression that until the proclamation in the Riot Act was read the dispersion of the rioters would be illegal. Lord Loughborough thus corrected this impression:—
2. "It has been imagined because the law allows an hour for the dispersion of a mob to whom the Riot Act has been read by the magistrate, the better to support the civil authority, that during that period of time the civil power and the magistracy are disarmed and the king's subjects, whose duty is at all times to suppress riots, are to remain quiet and passive. No such meaning was within view of the Legislature, nor does the operation of the Act warrant any such effect. The civil magistrates are left in possession of those powers which the law had given them before. If the mob collectively, or a part of it, or any individual, within or before the expiration of that hour attempts or begins to perpetrate an outrage amounting to felony, to pull down a house, or by any other act to violate the law, it is the duty of all present, of whatever description they may be, to endeavour to stop the mischief and to apprehend the offender."

21 As a general rule, however, it would be extremely imprudent to use an armed force against a mob until the proclamation had been read and an hour elapsed, except when the violence of the mob prevents the reading, or the mob

perpetrate, or are evidently about to perpetrate, some outrage amounting to a felony.

The purpose of the meeting, and whether it is likely to disperse, should be considered.

WHEN IS RESORT TO FORCE JUSTIFIABLE?

22 On this point Sir H. Thring writes as follows :—

"Undoubtedly the question is difficult, but many circumstances suggest themselves which may serve as a guide to justices and officers called on to act in cases of sudden tumult.

"They will first ask themselves for what purpose the mob has come together, as a knowledge of the purpose of the mob usually furnishes the most certain clue to a determination of the time and mode in which forcible interference should take place.

1. "For example, a mob assembles for the purpose of pulling down an obstacle to a foot-path, which has been obstructed either illegally or with doubtful legality. Their proceedings may be disorderly, but their purpose may be legal, and certainly is not felonious. The probability is, that as soon as they have effected their object they will disperse. In such a case, the best course is to use no force, but merely to take means to identify some of the parties concerned with a view to subsequent proceedings, if necessary.

"On the other hand, suppose a mob determined to destroy the cotton mill of an obnoxious proprietor. They arm themselves with weapons to break open the doors, and they show a settled intention to carry their object into effect. In such a case their intent is felonious, but they should be warned of the danger they will incur in attempting such an outrage, and the proclamations in the Riot Act should, if time allow, be read; and whether it has been read or not, and whether the hour after the reading has or has not expired, the ring-leaders should be arrested and any other

repressive measures necessary to prevent the actual committal of an outrage should be taken. Soldiers may be summoned in case the Civil authority is in danger of being overpowered, but they should not be called into action till the necessity arises for protecting life and property by military force.

2. "Take another instance. A meeting assembles in procession with a view to political objects, say the furtherance of Parliamentary reform, the abolition of an obnoxious tax, or any other political object not involving rebellion against the established authority, or a clear intention to enforce by violence the object, though legal, which they have in view. It is, of course, quite possible that excitement may prompt them to outrage, but such a meeting, so long as it commits no act of violence, should be interfered with as little as may be, and no exhibition of force should take place till some violent crime has been, or is about to be, committed.

"On the other hand, an assemblage which declares openly that it proposes to attack the constituted authorities, and which consists wholly or partially of armed men; or an attempt like that of the Fenians at Chester in 1867 to seize a castle for the purpose of obtaining arms, cannot be too quickly dealt with, and force should be repelled by force, care being taken to avoid any unnecessary bloodshed or injury."

23 Soldiers, when acting in aid of the Civil power, in no respect differ, in the view of the law, from armed citizens. Their organization prevents their being conveniently employed in using moderate force for the purpose of dispersing or apprehending rioters without doing them any injury; and as a general rule, any action on their part involves the risk of inflicting death, or, at all events, grievous bodily harm. Soldiers, therefore, should never be required to act except in cases where the riot cannot reasonably be expected to be quelled without resorting to such means of repression.

1. These cases are practically confined to riots in which violent crimes, such as murder, housebreaking, or arson,

are being committed, or are likely to be committed, and to insurrections in which an intention is clearly shown to attempt by force of arms the overthrow of the government, or the execution of some general political purpose. (*Thring.*)

RELATIVE RESPONSIBILITY OF MAGISTRATES AND MILITARY OFFICERS.

24 The primary duty of preserving public order rests with the Civil power. An officer, therefore, in all cases where it is practicable, should place himself under the orders of a Magistrate. On the other hand, an officer will not perform his duty who from fear of responsibility lies by and allows outrages to be committed which it is in his power to check, merely on the ground that there is no Magistrate on the spot to give orders to the military.

If the officer and Magistrate are acting together, the obligation lies on the Magistrate to give orders, and an officer would incur considerable responsibility by firing without his orders, or refusing to fire in pursuance of his orders. Still, the law of England is that a man obeys an illegal order at his own risk, and circumstances might arise which would justify the officer in firing or not firing, notwithstanding the Magistrate might give orders to the contrary.

1. In the case of the Bristol Riots in 1832. Captain Warrington was tried afterwards for neglect of duty, and set up in his defence that the refusal of an officer to act without a Magistrate was "in strict accordance with the rules of the service." This was declared by the prosecutor (Major-General Sir Charles Dalbiac) to be "a doctrine not in strict accordance with, but most decidedly opposed to, the orders and regulations of His Majesty's service as well as to the law of the land."

   There can no longer be any doubt on this point, as the Queen's Regulations (viii. 96) now distinctly state that the

officer "*is not to give the word of command to fire unless distinctly required to do so by the Magistrate.*"

25 The Magistrate also, if he acts with discretion, will necessarily defer in military matters to the opinion of an officer, and if he were to give orders to fire upon rioters, although dissuaded by the officer accompanying him, he would have great difficulty in defending himself, in the event of death occurring, should he be indicted for manslaughter.

1. The case of the Bristol Riots in 1832 is quoted, in which Mr. Pinney, a Magistrate, was tried by the Court of King's Bench, charged *inter alia* with want of energy in not ordering the military to fire, and pleaded that Colonel Brereton and Major Mackworth, two officers with the soldiers, dissuaded him from doing so, and that had he given an order to fire and death had ensued, he would, upon an indictment for murder or manslaughter, have had great difficulty in defending himself if it had appeared that he had given the order to fire against the advice of two distinguished military officers. Mr. Pinney was acquitted. (*Reg.* v. *Pinney.*)

26 It is clear that there is no exact definition of what are the relative duties and responsibilities of the Civil and military authorities when acting together in the suppression of riot. Complaint was made by Sir Charles Napier of the hardship of imposing on an officer the obligation of deciding whether he is or is not justified in ordering his men to act. He contended that an officer ought not to be liable to trial by the ordinary courts of justice for anything he may do in executing the duty imposed on him by the Civil Magistrate, namely, to quell the riot. Sir H. Thring remarks on this that an officer has no greater responsibility than a civilian, the magistrate or peace officer being also liable to be indicted for murder or manslaughter if by his acts he causes death,

and if he does not act he is also liable to an indictment for neglect.

In both cases the law has always made liberal allowances for the difficulties of persons so circumstanced, and persons whose intention is honest and upright, and who act with firmness to the best of their judgment, need seldom fear the result of inquiry into their conduct.

1. Lord Mansfield laid down the rule as regards military officers in these words: "In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form if their intention appears by the evidence to have been upright. The principal inquiry to be made by a court of justice is *how the heart stood*, and if there appear to be nothing wrong there, latitude will be allowed for misapprehension or mistake. But, on the other hand, if the heart is wrong, if cruelty, malice, and oppression appear to have occasioned or aggravated the imprisonment or other evil complained of, they shall not cover themselves with the thin veil of legal forms, nor escape under the cover of justification the most technically regular, from that punishment which is due to so scandalous an abuse of public trust." (*Wall.* v. *Macnamara.*)

CRIMINAL RESPONSIBILITY OF SOLDIERS ACTING IN AID OF CIVIL POWER.

27 Discipline requires that a soldier should promptly and unhesitatingly obey the command of his superior officer. The Army Act (A 9) lays down that a soldier who disobeys the lawful command of his superior officer is liable to severe punishment. The rule of the Common Law is (*Clode*, xvii. 68), "that an inferior, in an ordinary criminal

case, must be held justified in obeying the directions, not obviously improper or contrary to law, of a superior officer; that is, if the inferior acted honestly upon what he might not unreasonably deem to be the effect of the order of his superior."

So long as the military are acting in a *bonâ fide* discharge of their duty, obedience to a military command is a justification. Mr. Justice Willis says: "I believe the better opinion to be that an officer or soldier acting upon the orders of his superior, not being plainly illegal, is justified, but if they be plainly illegal, he is not justified."

1. Doubt was thrown on this subject, at the trial at Wexford in 1831, by the reply of Chief Justice Bushe to the question by the jury, whether, "if a military body be called out, and if the commander gives the order to fire, are those acting under his orders exempt from the consequences?" The reply being, "My opinion is that no subject of the king is bound to obey an illegal order, and if an officer gives an illegal order, those who obey him are not exempt." Of this Sir Charles Napier remarked,—
2. "Such a principle dissolves the army at once; it reduces the soldier to a choice between the hanging awarded to him by the local law for obeying his officer, and the shooting awarded him by the military law for disobeying his officer. In such law there is neither sense nor justice, and (being one of those unlucky red-coated gents thus agreeably placed between shooting and hanging) I beg to enter my protest against this choice of deaths. If such is law, the army must become a deliberative body, and ought to be composed of attorneys, and the Lord Chancellor should be made commander-in-chief." (*Clode, M. F.*, xvii. 70.)

ACTION OF MILITARY WHEN CALLED OUT.

28 The officer commanding the troops is to move to the place to which he shall be directed by the Magistrate; he is

to take care that the troops march in regular military order with the usual precautions, and that they are not scattered detached, or posted in a situation where they may not be able to act in their own defence.

1. The Magistrate is to accompany the troops, and the officer is to remain near him. (*Q.* viii. 94.)
2. All commands to the troops are to be given by the officer. (*Q.* viii. 96.)
3. The detachment, if under twenty files, is to be told off into four sections, if it is stronger than twenty files, into more sections than four. (*Q.* viii. 95.)

COMMAND TO FIRE.

29 The troops are not, on any account, to fire excepting by word of command of their commanding officer, or the officer indicated by him.

1. The officer *is not to give the word of command to fire unless distinctly required to do so by the Magistrate.*
2. If firing is unfortunately necessary, and is ordered by the Magistrate, officers and soldiers must feel that they have a serious duty to perform, and must perform it with coolness and steadiness, and in such manner as to be able to discontinue their fire the instant it shall be found no longer necessary. (*Q.* viii. 101.)

30 *Fire to be effective.* Officers must take the most effectual means, in conjunction with the Magistrate under whose orders they may be placed, for explaining beforehand to the people opposed to them that if the troops fire their fire will be effective. (*Q.* viii. 97.)

1. Care is to be taken not to fire upon persons separated from the crowd. It is to be observed, that to fire over the heads of a crowd engaged in an illegal pursuit would have the effect of favouring the most daring and the guilty, and

might have the effect of sacrificing the less daring, and even the innocent. (*Q.* viii. 100.)

31 *Amount of fire.*—The commanding officer must exercise a humane discretion respecting the extent of the line of fire. If he thinks that a slight effort would suffice to attain the object, he is to give the word of command to one or two specified files to fire. If a greater effort should be required he is to give the word of command to one of the sections to fire, the fire of the other sections being kept in reserve till necessary.

1. The fire of each section, if required, must be given by the regular word of command of the commanding officer, or if there should be more than one officer present, and it should be necessary for more than one section to fire at a time, the commanding officer must fix, and clearly indicate to the troops, what officer is to order any number of the sections to fire.
2. Such officer is to receive his directions from the commanding officer, after the latter shall have received the requisition of the Magistrate. No person, except the officer indicated by the commanding officer, is to give orders to any file or section to fire. (*Q.* viii. 99.)

32 *Duration of fire.* The firing is to cease the instant it is no longer necessary, whether the Magistrate may order the cessation or not. (*Q.* viii. 100.)

FRENCH INSTRUCTIONS.

33 The following are the French instructions on this subject, which, bearing in mind the difference between the two nationalities, may be useful to officers having to suppress serious disturbance.

1. All action of the troops should be the result of pre-concerted action between the military and Civil authorities.

Every commander of troops should study beforehand the best measures to take in case of the outbreak of disturbance, in concert, if possible, with the Civil authorities.

2. If in a fortress or garrison town disturbance suddenly breaks out, officers, sub-officers, and soldiers should repair at once to their quarters, where they remain and wait for orders. The officers who live in the neighbourhood of the barracks go there at once, those who lodge at too great a distance, or in parts of the town where there are hostile gatherings, will remain in their quarters. The adjutant-major of the regiment will immediately send a sufficiently strong patrol, commanded by an officer, to traverse the streets inhabited by officers who have not been able to come to barracks; who will be ready to join the patrol as it passes before their dwelling.

3. The forces ought not to be scattered, but maintained in bodies in order to act with vigour. If the strength of the garrison admits of it, however, the principal points from which the disturbance can be controlled will be occupied. In a large town it will be desirable to occupy the places which command the principal arteries, the houses of the prefect and general commanding, the public offices, the hospital, the railway station, telegraph office, office of the treasurer, &c. In a fortress the gates will be occupied, and, if necessary, will be shut. In a little open town the Hotel-de-Ville, Mairie, or some dominant points should be held.

4. It is of the greatest importance that the soldiers keep their prestige, and are not insulted or molested; for if they lose their moral force, order can only be re-established by violent measures. It is therefore necessary to avoid as much as possible leaving the troops in contact with the creators of disturbance, and to make them act vigorously when their intervention has become indispensable.

No absolute rule can be laid down in such matters, but when disturbance is to be feared, the troops would best be kept in their barracks, and not put in motion until circumstances require their intervention. Then their action, announced beforehand as irresistible, should be prompt, resolute, and decisive. It is better to avoid all collision, but

if it is necessary, no retirement must be allowed, for *power should always rest on the side of the law.*

5. If an attack has been made, or the third summons has been made (equivalent to reading the Riot Act) without result, force should be employed without delay and without hesitation.
6. The leaders of the troops should abstain themselves, and prevent their men, from entering into conversation with the public, above all with people who present themselves in the aspect of mediators. It is above all things necessary to keep the people at such a distance that they cannot harangue the soldiers, or throw themselves suddenly on their arms. To this end—
7. On arriving on a wide road, open place, or street, the commander of the troops should cause the ground he will occupy to be completely evacuated, and allow no person to enter it. Traffic should cease at once over the space occupied by the troops, only military men or authorized persons should be allowed to pass. The public should be held off at least 100 yards from the troops by sentries, who should enter into no conversation with the crowd. These will not remain halted, and will repulse by force any act of violence or any attempt to disarm them.
8. The commander of the detachment will announce firmly that if the sentries are forced, this violence will be considered as an act of hostility, to be met by force of arms.

All measures must be taken rapidly and without hesitation, every moment of delay increasing the moral and material force of the rising. (*Instructions en cas de Troubles*, 1883.)

HISTORY OF THE CALLING IN OF THE AID OF THE MILITARY.

34 After the establishment of the small standing army under the name of Guards and Garrisons in the reign of Charles II., the immediate sequence was their employment under the order of the Crown in the discharge of police

duties, a course of action tending to produce aversion to the troops.

By the Militia Act of 1663 (13 Carl. II.), the Lord-Lieutenant, a military officer, was made directly responsible for the public peace, having the power of searching for arms, and ordering the militia under arms and into service for the suppression of what this officer deemed to be insurrection or rebellion.

The soldiers of the regular army could be called on under 14 Carl. II. to collect customs, and under 22 Carl. II. to suppress conventicles.

The preface to the Articles of War of 1668 stated that the King maintained the army for "the peace of the kingdom till the minds of the people should be composed to unity and due obedience," and its employment was that of armed police, acting under the direct orders of the Crown. As there were at that time no barracks existing, the army were placed in billets throughout the kingdom, and its maintenance thus added to the grievances of the people.

35 At the time of the Revolution, the abdication of James II. and the accession of William and Mary, the control of the army and militia were both placed in Parliament, and the use of the military in aid of the civil power had to be sanctioned by the responsible ministers of the Crown; the constitutional rule, prior to the Crimean War, being that this use was controlled by one responsible, and expressly sanctioned by another Parliamentary, minister before the troops moved from their quarters at the call of the Magistrate. (*Clode, M. F.*, xvii. 11.)

36 At the close of Queen Anne's life, as there were plain indications of political disturbance, and that on her decease the friends of the Pretender would endeavour to recover his throne, one of the earliest statutes of George I. gave the

Civil Magistrate additional power for the suppression of tumult or political disorder. This Act, known as the Riot Act, varies little, except in omitting all reference to the Lord-Lieutenant and in mentioning only civil officers, from the statute of Edward VI. of A.D. 1549.

37 It provides in substance as follows: If twelve or more persons unlawfully and riotously assemble together to the disturbance of the public peace, and, after being required by any justice, by proclamation to be made in the King's name, to disperse and peaceably to depart to their habitations; shall remain or continue together *for one hour* after the proclamation, then such continuing together shall be adjudged felony, and the offenders felons.

38 The proclamation referred to runs as follows:

"Our sovereign lady the Queen chargeth and commandeth all persons being assembled immediately to disperse themselves and peaceably to depart to their habitations or to their lawful business, upon the pains contained in the Act made in the first year of King George the First for preventing tumults and riotous assemblies. God save the Queen."

1. It has been laid down (R. *v.* Child) that "God save the Queen" is necessary to render persons liable to conviction for remaining. (*Thring.*)

39 The object of the Act is to give all Her Majesty's subjects due notice that unless they disperse and separate they must take the consequences. "By the Act," said Lord Mansfield, "a particular direction is given to every justice for his conduct; he is required to read the Act, and the consequences are explained. It is a step *in terrorem* and of gentleness; not made a necessary step, as he may instantly repel force by force. If the insurgents are not doing any

act, the reading of the proclamation operates as notice. There never was a riot without bystanders, who go off on reading the Act."

1. The Riot Act was a statute originally passed in the reign of Edward VI., A.D. 1549, and re-enacted in the reign of Mary, when it was limited to the Queen's life; in like manner it was re-enacted by Elizabeth, but not again revived until, as above described, in 1715.
2. It may be interesting to know the present French equivalent to reading the Riot Act, as laid down in Act 26 of the law of the 3rd August, 1791, thus :—

   Act 26. If, in consequence of the progress of an assembly or popular tumult, or any other cause, the energetic use of force becomes necessary, a civil officer, either a justice of the peace, municipal officer, &c., &c., will present himself on the place of assembly and pronounce these words in a loud voice,—"Obedience to the law! Force is about to be used; let good citizens retire." The drums beat a roll at each summons.

   Act 27. After this summons, three times repeated, or in some cases after a first or second summons, if it is not possible to make a second or third; if the persons assembled do not retire peaceably, and more than fifteen remain assembled in a state of resistance, armed force will be at once used against the seditious, without any responsibility as to the result, and those who can be seized afterwards will be delivered to the police-officers, to be judged and punished according to law. (*Instructions en cas de Troubles*, p. 28.)

40 The earliest evidence that the War Office records afford of the use of troops in suppressing riots (as ascertained by Mr. Clode) bear date January 1717 and June 1717. Some subjects in Scotland and Ireland on these occasions indicted the soldiers for manslaughter or homicide, but the law officers of the Crown were directed to enter a *nolle prosequi*, and thus stop the action. In August 1717 a Council order was issued directing officers of the army to

afford aid to the magistrates and officers of the customs in the prevention of smuggling.

1. By the Customs Consolidation Act, 1853, in continuation of former Acts, it is laid down that "officers of the Army, Navy, or Marines, duly authorized and in full pay, may seize vessels, boats, and goods, and search and detain persons, &c." (*Clode, M. F.*, xvii. 11.)
2. In December 1720, on the outbreak of plague in the Isle of Man, the commanding officer of the troops at Lancaster was ordered, under the sign manual of the Deputy-Secretary at War, to aid and assist the civil magistrates in the prevention of persons landing from the island, "and to follow such orders and directions as you shall receive from the civil magistrates for the purposes above-mentioned, and to repel force with force in case the civil magistrates shall at any time think it necessary."

41 In 1721-2 the legality of using troops in aid of the civil power to put down riot was considered by the ministers of the Crown. In the report thereon, made by Lord Raymond (Attorney-General) with reference to riots among the labourers at Taunton, he specifies the circumstances under which the army could be lawfully used to aid the magistrates, adding as a caution that the army "should not at all interpose in any of these things, but at such times as they shall be desired by the civil magistrate." (*Clode, App.* cii. 2.)

42 On the occurrence of the riots in the west of England on account of the high prices of corn and provisions in 1766, Lord Barrington, Secretary at War, sent a letter to commanding officers of corps giving them authority to aid the civil power upon requisition being made in the usual manner by the civil magistrates for their assistance.

43 Between 1758 and 1763 the Crown was restrained from employing the militia as a military force except in case of rebellion, and then only after a communication to Parliament,

if sitting, or by order in council. The power of the Lord-Lieutenant to search for arms to secure the public peace was also withdrawn. These restrictions still remain in force.

44 In 1768, on the occasion of riots in London at St. George's Fields, the troops were placed by the Secretary at War under general orders to attend the call of the civil magistrates. The Guards, who were employed, were thanked for their services, but the magistrate who gave the order to fire and the soldiers who obeyed were both tried for murder; they were, however, acquitted, and the soldiers received compensation for their imprisonment.

Since this period the legality of employing the military in aid of the civil power has never been seriously questioned. (*Clode, M. F.*, xvii. 32.)

CHAPTER II.

INSTANCES OF THE USE OF MILITARY FORCE.

45 The following appear to be the principal instances in which the aid of the military has been called in to assist the civil power in the suppression of disturbance within the United Kingdom :—

1. 1716. 24th July. The "Mug-house" riots, between Whigs and Tories, quelled by the Guards. Five rioters hanged.

1736. Riots of Spitalfields weavers and Irish workmen, quelled by the military. Many lives lost.

1736. Porteous Riot, Edinburgh. Captain Porteous, on April 15th, commanded the guard at the execution of Wilson, a smuggler. The guard was pelted with stones by the mob, on which Captain Porteous ordered the guard to fire, by which seventeen persons were killed or wounded. He was tried and found guilty of murder on the 22nd June, 1736, but a reprieve was granted him. On the 7th September, 1736, a mob broke into the prison and hanged him on a dyer's sign-post in the Edinburgh Grass-market. None of the rioters were detected.

1768. 10th May. A mob assembled in St. George's Fields to see Mr. Wilkes in King's Bench Prison. The military were called out, and several people killed.

1780. June 4th to 8th. Gordon "No Popery" riots. These riots will be found more fully described further on; they afford good illustrations of the questions likely to arise from the use of the military on these occasions. (*See* §§ 46, 47.)

1811-12. Luddite riots in the north of England.

1815. March. Corn-Bill riots at Westminster, lasting several days.

1815. April. Riots among prisoners of war at Dartmoor. Seven American prisoners killed and 35 wounded.

1819. August 16th. Manchester reform meeting at Peterloo, 60,000 to 100,000 persons charged by cavalry and yeomanry, with a result of 11 persons killed and 600 wounded.

1821. August 26th. Riot at Knightsbridge between military and civilians.

1831. June 3rd. Riot of iron-workers at Merthyr-Tydvil. The military called in; several persons killed and wounded.

1831. October 29th to 31st. Serious riots in Bristol. Military called out. (*See detailed account*, § 48.)

1838. May 28th to 31st. The "Thomite" riots at Boughton, near Canterbury. Military called in; Thom killed.

1838. Chartist riots. Chartist Proclamation issued on December 12th.

1839. July 15th. Chartist riots at Birmingham put down by police, aided by 300 infantry and a troop of dragoons under Colonel Chatterton.

1839. November 4th. Chartist riots at Newport; 10,000 Chartists armed with guns, pikes, &c. arrived at Newport and assembled in front of Westgate Hotel. The rioters fired on the soldiers of the 45th Regiment occupying the hotel, who returned the fire, twenty persons being killed and many wounded. A detachment of the 10th Hussars from Bristol assisted in restoring order. (*See more detailed account in* § 49.)

1852. July 22nd. Election riot at Six-Mile Bridge, Co. Clare, Ireland. Five persons shot by the military.

1853. October 28th. Riot of coal-miners at Wigan. The military called in; no loss of life.

1861. February 11th. Rising of convicts at Chatham. Military called out.

1863. March 21st. Riot of cotton-workers at Staleybridge, put down by military.

1869. June 2nd. Colliery riots at Mold, Flintshire. The military called out. Four deaths.

1874. October 6th. Riots at Northampton; non-election of Mr. Bradlaugh. Put down by military.

1878. May 14th and 15th. Cotton-strike and lock-out at Blackburn, Burnley, Accrington, and Preston. Quelled by military.

THE GORDON "NO POPERY" RIOTS IN 1780.

46 These riots became serious in their result from the neglect or apathy of the civil magistrates on the first appearance of riot and disorder. The account annexed will show that they refused to accompany the troops, and that the Secretary for War then put forward a request that some authority or instructions should be issued directing how the troops were to act in such an emergency. A council was hastily summoned, and authority given to the military to put down the riot without the intervention of the civil power. This was an extreme measure, partaking in some degree of the character of Martial Law.

1. Lord Thurlow justified the action on the ground that the military were only thus employed after it had been in vain endeavoured to quell the riots by the intervention and authority of the civil power, "and therefore the case being so far similar to the rebellion in 1715 and 1745, that there was an actual insurrection, that the laws of the land were trampled underfoot, and the King's Government opposed."

47 The following sketch is given because these riots illustrate well what ought and what ought not to be done when civil disturbances arise.

In the Lord George Gordon or "No Popery" riots of 1780 a crowd of from 50,000 to 100,000 persons assembled on June 2nd in St. George's Fields, and, headed by Lord

George Gordon, himself a member of the House of Commons, marched to Westminster to present a petition to the House. When they arrived in Palace Yard they attacked and grossly insulted certain members of the Houses, and finally thronged and took possession of the lobbies of the House of Commons, while Lord George presented the petition. Two Middlesex magistrates, summoned to the bar of the House of Lords, declared that they had received no orders from the Government, and that with all their exertions since the beginning of the tumult, they had only been able to collect six constables. After an anxious period of suspense, during which the House was in great danger from the mob, a party of Horse Guards, who had been sent for by Lord North, appeared, with Mr. Addington, a magistrate; the streets were cleared without bloodshed, the lobbies of the House cleared, and a party of Foot Guards drawn up in one of the law courts off Westminster Hall. That night the rioters burnt the Roman Catholic Chapels of the Sardinian and Bavarian Ministers, the soldiers only arriving in time to arrest thirteen of the rioters.

1. On Sunday the 4th June the mob proceeded to further outrages, while the magistrates remained passive, Kennett, the Lord Mayor, being a man wholly wanting in energy and firmness. On the 5th a Privy Council was held, but nothing further was done than to offer a reward of £500 for the discovery of the incendiaries of the chapels of the embassies; the riot was looked upon as a slight matter, and so treated of even by Lord Mansfield. That day, however, the mob proceeded to further outrages, plundering shops and destroying the houses of persons obnoxious to them.
2. On the 6th the disturbances increased, and although the Houses were protected by a detachment of Foot Guards in Westminster Hall, some of the members were attacked as they arrived, and their carriages demolished. Lord

North's house in Downing Street was attacked, but was saved by a party of soldiers. Newgate was broken into, the prisoners released and the building burnt. Clerkenwell Gaol was broken open, and the houses of Lord Mansfield and other persons burnt.

3. In the mean time a large military force had been assembled by the Secretary for War ready to assist the magistrates in preserving the public peace. The magistrates, however, entirely failed to carry out their duty; when they called out the troops they either neglected to attend them, or left them exposed to the fury and insults of the populace without authority to resist. In some cases, even after the troops had marched to the places appointed for them, the magistrates refused to act.
4. While Lord Mansfield's house was being gutted and burnt, a detachment of Guards was within hearing and almost within sight of the house, but were restrained by the doubts which then prevailed whether the troops had any legal right to fire upon the mob unless a magistrate was present to read at full length the provisions of the Riot Act. The officer in command, on being appealed to, replied that the Justices of the Peace had all run away, and that consequently he could do nothing. In this case a magistrate was at length caught and made to mumble through the clauses of the Riot Act, after which the soldiers fired two volleys, killing and maiming some five or six persons; this, however, made but little impression on the mob, now maddened by drink and excitement.
5. The night of the 6th passed in conflagration and dismay, and the next day the city was at the mercy of the rioters, who openly burnt and plundered, and levied black-mail on the citizens. The Bank of England was attacked, but being occupied by soldiers, resisted the efforts of the mob.
6. On that day, the 6th, the Secretary at War, Mr. Jenkinson, wrote to the Secretary of State describing the failure of the magistrates to support the military, and concluded his letter thus: "It is the duty of the troops, my lord, to act only under the authority and by the direction of the civil magistrate. For this reason they are under greater restraints than any other of His Majesty's subjects, and

when insulted are obliged to be more cautious in defending themselves. If, therefore, the civil magistrate, after having called upon then, is not ready to attend them, or abandons them before they return to their quarters; or if, after they arrive at the places to which they have been ordered, he refuses to act, I leave it to your lordship to judge in how defenceless and how disgraceful a situation the military are left, and how much such conduct as this tends to encourage riots, to bring matters to the last fatal extremity, and how much the public service as well as the troops must suffer by it. I am forced to urge this matter the more strongly to your lordship, as what I have now laid before you are not the first instances that have come to my knowledge of a conduct of the like kind in the civil magistrates."

7. As Lord Mahon (vii. 46) says, "Up to this time there had been disgraceful terror in the magistracy, and as disgraceful torpor in the Government. Some men thought mainly of their own escape; others seem to have imagined that the rage of the people, like some impetuous flood, must quickly exhaust itself and pass by." Such had been the craven spirit of some men in authority that, according to the Duke of Grafton, even the Secretary of State's servants had worn in their hats the cockades of the rioters.
8. Although by the 7th at least 10,000 soldiers were assembled, besides militia, the belief that the soldiers had no legal right to fire until one hour after the Riot Act had been publicly read prevented their use.
9. The King was the first to show energy and determination. He called a council on Wednesday the 7th, and, himself presiding, laid before the ministers the difficulty respecting the Riot Act. "The whole Cabinet wavered, well remembering the riots of 1768, and the readiness at that time of juries to find verdicts against the officers and soldiers who had only done their duty." Attorney-General Wedderburn, however, stated that in his opinion the delay of an hour is not required by law when the mob is engaged in a felony, as setting fire to a dwelling-house, and cannot be restrained by other means. The ministers concurred, and the King declared he would carry out the decision, saying,

"There shall be at all events one magistrate in the kingdom who will do his duty."

10. By the King's commands a proclamation (*Clode, App.* cix.) was immediately drawn up and issued that same afternoon, warning all householders to keep themselves, their servants or apprentices, within doors, and announcing that the King's officers were now instructed to repress the riots by an immediate exertion of their utmost force. Such instructions were sent accordingly from the Adjutant-General's office in the following form:—

"In obedience to an order of the King in Council, the military to act without waiting for directions from the Civil Magistrates."

11. On the evening of the 7th the rioters found themselves confronted by a determination equal to their own. Bodies of militia, or of regular troops, were sent straight to any points where uproar and havoc most prevailed. Thus, for instance, the Northumberland Militia, which had come that day by a forced march of 25 miles, were led at once by Colonel Holroyd into Holborn, amidst the thickest of the flames. A detachment of the Guards drove before them the plundering party which had taken possession of Blackfriars Bridge. Here several were killed by the musketry, while others were thrown, or in their panic threw themselves, over the parapet into the Thames. Wherever the mob would not disperse the officers gave the word, and the soldiers fired without further hesitation.

12. According to the returns sent in to Lord Amherst as commander-in-chief, upwards of 200 persons were shot dead in the streets, and 250 were lying wounded in the hospitals, of whom 70 or 80 within a short time expired. These returns were far from conveying a full statement of the numbers that perished.

13. The action thus taken by the military was decisive. On the morning of Thursday, the 8th June, no trace was to be seen of the recent tumults, no renewed attempt was made at riot, or even at gathering in the streets. Parties of soldiers were encamped in convenient places, as in the parks, the museum gardens, and Lincoln's Inn Fields, ready to act on any fresh emergency had any such occurred.

14. A rumour was circulated in London that the prisoners in the hands of Government would be subject to Martial Law. A hand-bill, issued by authority, was put forth, declaring that no such purpose had ever been in the contemplation of Government, and that all persons in custody would be tried in due course, according to the usual forms.

15. In these riots, so great had been the remissness and timidity of Kennett, the Lord Mayor, that at a later period he became the object of a prosecution by the Attorney-General, and was convicted.

16. At the subsequent meeting of Parliament, addresses of thanks to His Majesty for the suppression of the riots were carried by both Houses. When discussion rose in the House of Lords as to the lawfulness of the military measures taken, Lord Mansfield concluded his remarks as follows :— "His Majesty, and those who have advised him, I repeat it, have acted in strict conformity to the common law. The military have been called in, and very wisely called in, not as soldiers, but as citizens. No matter whether their coats be red or brown, they were employed, not to subvert, but to preserve, the laws and constitution which we all so highly prize."

17. The prisoners were tried by a special commission at the Old Bailey, over which Wedderburn, now Lord Loughborough and Chief Justice, presided. Twenty-one persons underwent the extreme sentence of the law.

RIOTS AT BRISTOL IN 1831.

48 These most destructive riots rose to the pitch they did owing to the feeble use made of the military when called out, and the delay in calling for their services. It is one of the very few instances in which British officers have been brought to trial for neglect of duty when called out for the suppression of riot.

1. On the 8th October, 1831, the Second Reform Bill, passed by the House of Commons on the 21st September by a majority of 109 votes, was thrown out by the House of

Lords. On the 20th October Parliament was prorogued until the 22nd of November, notice being given in the King's Speech that the Reform Bill would be again introduced in the ensuing session. In consequence of this state of things great excitement and disturbance prevailed throughout the country, especially in the large towns, the most serious outbreak of any occurring at Bristol, as described below.

2. On the 29th October, 1831, Sir Charles Wetherall, who was exceedingly unpopular, owing to his opposition to the Reform Bill, entered Bristol in his judicial capacity as recorder of the city, and was publicly received by the mayor and magistrates in the manner usual in such occasions. The cavalcade was followed by a tumultuous crowd, who, commencing by hissing, hooting, and groaning, soon proceeded to pelting the procession with stones and brickbats, the cheering of a number of respectable citizens assembled at the commercial rooms increasing the irritation of the rioters.

3. The mayor vainly endeavoured to persuade the people to disperse, but finding their violence increase, unwisely sent away part of the special constables who appeared particularly obnoxious to the mob, and though he read the Riot Act, did not call out the military. The consequence of this was, that for some time the rioters had it all their own way; the mayor, recorder, and magistrates got safely to the Mansion House, but soon after the mob attacked the remaining constables, and driving them back, broke into the Mansion House, destroyed all the furniture, and tearing up the palisades in front, armed themselves with them for the work of further destruction. Sir Charles Wetherall and the magistrates made their escape by a back-door, and the former immediately left the city.

4. The Mayor then called out two troops of dragoons, but they remained inactive for some time, and the rioters attacked the Custom House. The dragoons were then ordered to disperse them, which was soon done, and the riot put an end to for the day.

5. During the night and the following Sunday morning the rioters were joined by many bargemen, and most of the

disorderly spirits of the city, and at an early hour re-commenced the work of destruction. The county prison and city gaol were broken into, the prisoners liberated, and the buildings set on fire; the bishop's palace, the Custom House, Excise Office, and many other public buildings shared the same fate, as well as a number of private houses, and all the toll-gates in the neighbourhood were destroyed. Part of the mob went to the docks and tried to set fire to the shipping, but were driven off by the sailors, who came to the rescue of the ships.

6. According to some accounts the magistrates were responsible for all these lawless acts. It was said that, in order not to irritate the people, they sent the dragoons out of the city, and remained all day inactive. Other accounts lay the blame on Colonel Brereton, who was in military command.

7. Whoever was to blame, the mob had the city to themselves during the whole of Sunday, October 30th. They burned forty-four private houses and warehouses, besides the public buildings, the sky at night being red from the flames of the burning city. During Sunday, the mob gained access to public and private stores of beer, wines, and spirits, and most of them got drunk; some lost their lives in the burning buildings, while in several houses women and children, who had taken refuge in the upper rooms as the mob approached, perished in the flames rising from the rooms below as these were fired by the rioters.

While the work of destruction was going on many of the rioters feasted in the streets on the plunder from the houses they had sacked. In Queen's Square, while the houses on two sides of the square were in flames, men and women sat round tables making merry in the middle of the destruction which raged around them. All this time the military remained in barracks.

8. The next morning, the 31st of October, the dragoons, under the command of Captain Wetherall, again entered the city, and soon cleared the streets of rioters, who fled before the troops, many perishing in the still burning houses. In a very short time after the military began to act, quiet was restored.

The soldiers made numerous prisoners; the rest of the rioters fled to their homes or wherever they could get shelter. It was ascertained that 110 persons were killed or injured, and probably the number who really perished was still larger.

9. A Special Commission was appointed to try the rioters, which commenced its sittings in December 1831, and tried more than 100 prisoners, of whom 81 were convicted. Five were sentenced to death, of which four only were executed, the remaining 77 undergoing various terms of transportation and imprisonment.

10. The Mayor of Bristol, Mr. Pinney, of whose conduct many persons complained, was tried by the Court of King's Bench for neglect of his duty as chief magistrate for the city. The jury, after hearing the evidence, returned a verdict of "not guilty," and declared their opinion that, "in a situation of extreme difficulty, and when deserted by those from whom he was entitled to expect aid and encouragement, he had conducted himself with great firmness and propriety."

11. As the statements of some of the witnesses at the trial of the mayor implicated the military, as not having afforded him a proper support, the commander-in-chief caused a court-martial to assemble to inquire into the conduct of Colonel Brereton and his officers, the trial commencing on the 9th January, 1832.

The evidence certainly tended to show that they had not acted with the promptitude and determination usual with military men. On the night of the 12th January Colonel Brereton, overcome by his sense of the disgrace which threatened him, shot himself through the heart. The court-martial suspended their sittings on account of this melancholy event, but resumed them in February, on the 23rd of which month Captain Warrington was found guilty of neglect of duty, and was sentenced to be cashiered. His Majesty, however, allowed him to sell his commission.

INSURRECTION AT NEWPORT, 1839.

49 This rising is chiefly noticeable in this connection as an instance of the suppression of a most serious insurrectionary movement by the action of a wise and energetic chief magistrate, assisted by a small but well-commanded body of troops. It is a striking example of the advantage of prompt and energetic action at the commencement of an outbreak.

1. During 1837 the Chartist agitation had become active and troublesome to the Government. The Chartist party was named from the "Charter," the adoption of which was energetically pressed forward by the leaders of the movement, supported by a considerable section of the people. The "Six Points" of this Charter were,—1st, Universal Suffrage; 2nd, Vote by ballot; 3rd, Paid representatives in Parliament; 4th, Equal electoral districts; 5th, The abolition of a property qualification; 6th, Annual parliaments. Both the Whigs and Conservatives agreed together to resist this Charter, as destructive of the British constitution and invading the rights of property.
2. During 1838 the Chartists became a formidable party, and in the first half of 1839 many demonstrations were made by them of an alarming tendency. On the 14th June a monster Chartist petition was presented to the House of Commons by Mr. Attwood, and on the 15th of July a serious riot took place at Birmingham, where a large mob, armed with scythes, rails, and bludgeons, rifled shops, and were only dispersed after a severe struggle with a force of police, aided by some 300 infantry and a troop of dragoons under Colonel Chatterton.
3. Newport in Monmouthshire, the chief town of the tract of country known as the Hill District, contained in 1839 a mining population of nearly 40,000 persons, in a region which about the year 1790 was inhabited by only a few scattered shepherds. There were scarcely any schools in the district, the consequent ignorance of the people favouring the action of agitators and the fermenting of insurrection.

4. In the summer of 1838, at a public meeting held at Pontypool, near Newport, for the purpose of explaining and advocating Chartist opinions, Mr. John Frost, a linen-draper, who was also a justice of the peace, delivered a very violent speech, which, after some correspondence with Lord John Russell, resulted in his ultimate removal from the bench. Frost after this associated openly with the disaffected persons in the district, and, with a watchmaker called William Jones, and a publican called Zephaniah Williams, organized an armed insurrection. This was to break out at Newport, of which town the insurgents were to take possession, the hoisting of the Chartist flag there being the signal for a similar movement in Birmingham and other large towns where the Chartists were numerous. They had induced most of the working-men of the hill district to join in the movement; they were strengthened by others from Monmouth, Brecon, Merthyr-Tydvil, and the mountainous districts, and thought themselves certain of success. The number of men connected with the movement was estimated as at least 10,000.

5. It was arranged that the insurgents should assemble on the evening of Sunday, the 3rd November, in three bodies—one at Blackwood, under John Frost; a second at Nant-y-glo, under Williams; the third at Pontypool, under Jones. The three were to concentrate at Risca, and march from thence at such hour as would enable them to reach Newport on Monday morning at one o'clock. On taking Newport they were to secure the military post, break down the bridge over the river Usk, and then throw up rockets from the neighbouring hills as signals to their friends at a distance. They were to prevent the mail from leaving Newport, and its non-arrival at Birmingham was to apprise the Chartists there that the movement had succeeded. This was to be followed by a general rising in the northern counties, where the "People's Charter" was to be proclaimed as the law of the land.

6. The magistrates at Newport, having been informed from some quarter that the town was to be attacked, made what preparations they could for its defence. Special constables were sworn in, divided into three bodies, and stationed at

the three principal inns. The mayor, Mr. Phillips, applied to Captain Stack, who commanded a detachment of the 45th Regiment quartered in the neighbourhood, for assistance, and that officer despatched 30 men, under Lieutenant Grey, to the town.

7. The mayor, with the soldiers and a body of police, took up his quarters at the Westgate Hotel, the principal inn in the town, and awaited the approach of the insurgents. In the hotel were two large rooms, one at the east and the other at the west end, with projecting windows opening on the street, and communicating with each other by a corridor. The eastern room was occupied by the mayor with the military, the western by the magistrates with the police, while the exterior doors were guarded by the special constables.

8. Owing to bad weather on the night of the 3rd November, instead of the three divisions of insurgents reaching Newport together at 1 a.m. on the 4th, it was 10 a.m. on that day before the division under Frost arrived alone. The men, said to be about 5000 in number, entered the town in two parties, united in the market-place, and marched to the Westgate Hotel. On reaching the inn, and seeing the constables guarding the entrances, they summoned them to surrender, and on their refusing, an order was given to attack them.

9. The insurgents were many of them armed with muskets, the rest with pikes, bludgeons, and other weapons. A volley having been fired by them at the bow-window of the east room, by which the mayor and several of the soldiers were wounded, the military returned the fire; the insurgents, however, driving off the special constables, soon forced the doors and entered the hotel. They found that some of the soldiers had occupied a lobby commanding the entrance-hall, from which such a well-directed fire was opened that 20 of the insurgents soon fell dead and many were wounded. The soldiers left in the east room also fired on the crowd below, and in a very short time, notwithstanding their immense preponderance of numbers, the insurgents broke and fled. A detachment of the 10th Hussars from Bristol assisted in restoring order.

10. The other two divisions of insurgents were far in rear of Frost's: that under Williams reached Newport while the firing was going on, but the men took scarcely any part in it, breaking up and making for the hills; that under Jones heard of the defeat of the insurgents on their way to Newport, and was disbanded by him in consequence.
11. Frost and Williams were arrested the same evening; Jones soon after. A considerable number of the other insurgents were also arrested and sent to Monmouth for trial on charges of high treason and sedition. The Chartists remained for some time on the hills, and great apprehension was felt of another attack. Their defeat at Newport had, however, completely disheartened them, and they ultimately dispersed.
12. A sergeant and private of the soldiers and two special constables (tradesmen of Newport) were severely wounded; several other special constables received injuries, but none of those persons on the side of order were killed.
13. The Queen's approval of their conduct was transmitted to the mayor and the magistrates, and the former received the honour of knighthood as Sir Thomas Phillips.
14. After the prisoners had been examined by the magistrates, a Special Commission, of which the Chief Justice, Sir N. C. Tindal, was the head, was opened at Monmouth on January 1st, 1849, for the trial of the prisoners Frost, Williams, and Jones. All these were found guilty, and received sentence of death; but owing to the numerous petitions sent to the Home Office praying for mercy, the sentences were commuted to transportation for life, and they were sent to Australia.

CHAPTER III.

THE SUMMARY USE OF MILITARY FORCE IN CASE OF EMERGENCY.

IN CASE OF CIVIL DISTURBANCE.

50 It is laid down in the Queen's Regulations (*Q.* viii. 93), that no officer is to take out troops for the purpose of aiding in the suppression of riot, the maintenance of the public peace, or the execution of the law, except upon the requisition, in writing, of a magistrate, or *in cases of great and sudden emergency.* It is therefore to be inferred, that in cases of great and sudden emergency it is the duty of an officer to act on his own responsibility in suppression of outrage or rebellion, and that in so doing he would be only carrying out his duties as a citizen and subject of the Queen.

1. In extreme cases, where the danger is pressing and immediate, where a felony has actually been committed, or cannot otherwise be prevented, and from the circumstances of the case no opportunity is offered of obtaining a requisition from the proper authorities, the military, like the civil subjects of the Queen, not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people. (*Clode, M. F.*, xvii. 49.)

51 It is, of course, distinctly to be understood, that when

the authority of a civil magistrate can be obtained no officer should act without it, but cases may occur where the magistrates might be in the power of rioters, or be otherwise unable to act, or where the magistrates themselves, from weakness or treachery, might neglect or refuse to do their duty.

CIRCUMSTANCES JUSTIFYING THE INDEPENDENT ACTION OF THE MILITARY IN CASE OF EMERGENCY.

52 The circumstances under which the military are justified in acting independently in the restoration of order are clearly shown in the answer to questions put to four leading counsel with reference to the riots at Taunton in 1801, viz.—

"Would it be prudent, in case of great necessity, for the military to act in the absence of the magistrates and peace officers?" The answer being,—"The duty of the military is the same as that of all subjects, and they are alike bound to use the means in their power to maintain the public peace, though in the absence of the magistrates and constables the prudence of their acting must depend on the occasion, and *in cases of great necessity we have no doubt in saying that they ought to act.*" (*Clode*, App. cii. 22.)

On the same occasion the Attorney-General, Edward Law, afterwards Lord Ellenborough, stated in his written opinion, —"*In cases of great and sudden emergency, the military, as well as all other individuals, may act without the presence of magistrates, or without the presence of any other peace officer whatsoever.*"

1. After the Bristol Riots of 1832 Captain Warrington was tried on three charges for neglect of duty when acting with the troops in suppression of the riot. In his defence he pleaded that the refusal of an officer to act without a magistrate was "in strict accordance with the rules of the

service." The official prosecutor, Major-General Sir Charles Dalbiac, protested against this view of the case, stating it to be "a doctrine at variance with all the declared opinions of all our soundest Crown lawyers since the days of Elizabeth, a doctrine not in strict accordance with, but most decidedly opposed to, the orders and regulations of His Majesty's service, as well as to the law of this land—a doctrine calculated not only to destroy the moral as well as the professional principles of the soldier, but to expose the person as well as the property of the subject to violence and to destruction—a doctrine which if admitted would enable every officer when placed in command of His Majesty's troops for the suppression of tumult, to place the inertness of the civil power between himself and the personal responsibility of his station, and under the protection of such inertness, to shelter himself from blame and disgrace." Captain Warrington was found guilty of the three charges, and was dismissed the service. (*Clode, note*, H. H.)

MILITARY FORCE IN CASE OF EMERGENCY.

53 Even if at first acting in conjunction with the civil magistrates, occasion may arise which will justify an officer in assuming the responsibility of using military force *during a disturbance;* such an occasion is described by Mr. Clode as follows:—"Troops are called in to aid the civil power, and act for a time at least under the direction of the magistrates. From necessity or supineness, the latter may either retire, or their authority may be completely destroyed, so that the military officer alone has to suppress the riot and restore peace. Thus a united force of constables and soldiers, originally arrayed under the civil power, in the course of events passes under the command of the military officer, rightly assuming the responsibility, when the civil authorities have shown themselves incapable of upholding public order. Such, in outline, were the facts of the case in 1780, when the

followers of Lord George Gordon sought to destroy London. The military, in acting without the civil power, were so far supreme; but this supremacy ceased when the riots were put down, and the prisoners were handed over to, and tried by, the civil tribunals of the country." (*Clode, M. and M. L.*, viii. 17.)

1. An officer so acting in case of emergency must remember that his independent action must cease the moment that circumstances restore the action of the civil power, and he should also remember that when a magistrate is present to suppress disturbance, the Queen's Regulations lay down distinctly, that no order to fire is to be given except upon the requisition of the magistrate. (*Q.* viii. 93.)

FOR THE SUPPRESSION OF MUTINY.

54 Although Military Law, as stated in the preamble to the Annual Army Act, provides for persons belonging to the Forces "who mutiny or stir up sedition" being "brought to a more exemplary and speedy punishment than the usual forms of the law will allow," still it is evident that circumstances may arise in which it may be necessary to act with greater promptitude than even the most summary and speedy methods of Military Law permit.

In the case of serious mutiny it is obvious that its prompt repression is imperatively called for in the interests of the community, and that decisive action on the part of the military authorities at the commencement of a mutiny may stop a movement which otherwise might imperil the safety of the State.

55 That power to act summarily in such a case is necessary, was pointed out by Sir D. Dundas, then Judge-Advocate-General, when giving evidence, in 1850, before a Parlia-

mentary Committee on the disturbances in Ceylon, in these words:—"If five or six regiments were to mutiny in the field, would any one tell me you must apply to Parliament before you could reduce those persons to subjection? *There must be, somewhere, for public safety, a right to execute such power in time of need.* I have heard it stated that such a thing has happened in our own times: four or five regiments in open mutiny in the field, and no time to take the opinion of any executive authority, and the officer in command did that which a soldier in command is bound to do, namely, he took measures for the purpose of suppressing such disorder; and he was prepared to put those people to death, if it were necessary." (*Clode*, xviii. 9, *note* 3.)

1. Mr. Finlason says, page 80:—"Even in ordinary times, and without any declaration of martial law, if there is a mutiny, or reasonable apprehension of it from mutinous and insolent words on the part of military persons in the presence of others, summary military justice would be justified;" and he quotes Lord Ellenborough, in Governor Wall's case:—"If there had been a mutiny, the Governor might have been justified in inflicting a most severe punishment, without formal trial."

   Again he declares, page 82:—"The principle which has been judicially established is, that if there is a mutiny or rebellion, persons under military law may be dealt with summarily and severely."

EXTENT OF MUTINY JUSTIFYING SUMMARY ACTION.

56 To justify an officer in command of troops in acting summarily and using force for the suppression of mutiny, it is necessary that the mutiny should be of such a dangerous character, that the forms of military law cannot be complied with.

1. Such a mutiny as would justify summary action was defined by the Chief Justice, Lord Loughborough, in the case of Governor Wall, as "such mutiny" "as would put a good officer, a man of common firmness, into such a state of alarm as would make extraordinary means necessary instantly to quench the fire by overlaying it in the speediest way that he possibly could." (*Clode*, xviii. 9.)

57 That cases may occur in which the ordinary forms of judicial procedure may be dispensed with was clearly shown in the speech of the Attorney-General, Lord Ellenborough, in the case of Governor Wall's trial, in 1802, when he spoke as follows :—"But let it not be understood, on that account, that there may not be circumstances which may constitute a sufficient, adequate, and full defence for a military officer in *the infliction of punishment, without either a general or regimental court-martial;* for if there be that degree of imminent necessity, which supersedes the recourse to any ordinary tribunal—if there be, actually existing, that flagrant mutiny, which must either be suppressed by force, and by the immediate though irregular application of severe punishment, or must be left to rage uncontrolled at the utmost peril of public safety—that which I was just now pronouncing to be irregular becomes, if the more regular and appropriate course of proceeding in such cases cannot be resorted to, itself regular, and capable of being justified upon every principle of public duty : for it imports the public safety that the means of resisting an enormous and overbearing evil should be as strong, sudden, and capable of application as the evil itself is capable of immediate mischievous effect." (*Hough*, p. 380.)

1. A case of this sort is reported as having occurred in India many years ago, when Colonel Kelly, commanding a detachment in the East Indies, on the discovery of a

mutiny in one of his battalions, fomented by the native officers, ordered the troops immediately under arms, and assembling a field or drum-head court-martial, seized, at the head of his battalion, the person of the native commandant, and subjected him to instant trial; and on conviction of the accused by the court, which followed, ordered the offender, without any time for preparation for so awful an end, to be blown away from a gun. This timely execution struck such a terror through the ranks that no other punishment was necessary to break the confederacy, the body of the mutineers being affrighted from their purpose by the fate of their head. (*Hough*, p. 383.)

2. Another case in which no judicial form of any sort was followed, was that of Thomas, Lord Camelford, Commander of the 'Favourite' sloop of war, who, on the 13th January, 1798, shot down Lieutenant Peterson, of the ship 'Perdrix,' "for very extraordinary and manifes disobedience to his lawful orders, and for arming the ship's company to resist the same." He was honourably acquitted by a naval court. (*Clode.*)

FOR THE MAINTENANCE OF DISCIPLINE.

58 The provision under the Army Act of courts so easily convened and so speedy in their method as field-general and summary courts-martial, render it improbable that it will be necessary in future to resort to punishment without trial. Nevertheless it must be remembered that the maintenance of discipline is essential to the efficiency and almost to the existence of an army in the field, and that the circumstances of actual war are sometimes of so trying a nature as to require the severest measures and the sternest examples to enforce that discipline.

1. The Duke of Wellington, with whose opinions on this point none other can compare in importance, in writing on this subject to Lord Castlereagh, from the Peninsula,

in 1809, said :—"I am convinced that the law is not strong enough to maintain discipline in an army upon service," giving as the reason for his opinion, that the witnesses on whose evidence the courts-martial could alone convict, were soldiers on whose own actions the courts acted as a restraint. It can easily be imagined that it may be extremely difficult to get soldiers to give true evidence against comrades accused of breaking regulations which they themselves detest, and which may be nevertheless essential to discipline. Another difficulty mentioned by the Duke was the want of officers, it being impossible "to leave with every hospital, or with every detachment, two captains and four subalterns, in order to be enabled to hold a detachment court-martial." A summary court-martial, under the Army Act, may consist of only two officers, but it requires to have three members to punish capitally, so the same difficulty may again arise.

2. The Duke of Wellington considered that "when the army is on service in a foreign country, any one, two, or three officers ought to have the power of trying criminals, and punishing them instanter; taking down all proceedings in writing, and reporting them for the information of the Commander-in-Chief on their joining the army." He further considered, that "there ought to be in the British Army a regular Provost establishment, of which a proportion should be attached to every army sent abroad."

59 Provost-marshals in the British service have not now any power of punishment on their own authority (*A.* 72, 2). Under the Articles of War existing before the Army Act, they possessed the power of punishing those whom they detected in the actual commission of crime, the punishment being limited by the necessity of the case and the orders received by them from the Commander of the Forces in the field. This power was frequently exercised.

1. The Duke of Wellington wrote of it :—"By the custom of British armies the Provost has been in the habit of

punishing on the spot, even with death under the orders of the Commander-in-Chief, soldiers found in the act of disobedience of orders, of plunder, or of outrage." And he declared that he did not know "in what manner the army was to be commanded at all, unless the practice was not only continued, but an additional number of Provosts appointed." (*Clode, M. F.*, App. cxii. 1.)

2. The Duke of York, when the army was in Holland in 1794, and soldiers had committed a robbery, murdered a woman and wounded a child, "did not hesitate for a moment to order the Provost-marshal to proceed to the scene of the outrage, and by the instant execution of the offenders to put a stop to such conduct." (*Clode, M. and M. L.*, viii. 7.)

   Again in October 1810, the Duke of Wellington ordered the immediate execution by hanging of a British and Portuguese soldier caught plundering in the town of Leiria.

3. The difficulty experienced by the Duke of Wellington in repressing plundering and the ill-treatment of the inhabitants was very great. In the general orders of May 1809, he warns the officers "that the army will very soon be no better than a banditti;" and in a despatch to Lord Castlereagh he writes, "that the British army was worse than an enemy in the country." The difficulty of obtaining a conviction before a court-martial was very great, as the Portuguese were afraid to, and the soldiers would not, appear as witnesses against the offenders.

   An illustration of the necessity of severe punishment may be given in the following extract from the Duke's *Despatches* (vol. iv. 5, 6):—"A detachment seldom marches, particularly if under the command of a non-commissioned officer only (which rarely happens), that a murder or highway robbery, or some act of outrage, is not committed by the British soldiers, comprising it . . . . and I am sorry to add that a convoy has seldom arrived with money that the chests have not been broken open, and some of the money stolen by the soldiers in whose charge it was placed, and they have never brought up shoes or other necessaries which could be of use to them,

or which they could sell, that they have not stolen some of the articles." The Provost-marshal had authority given him by the Duke to punish on the spot the heinous crime of plundering provisions coming to the army. (*Clode, M. and M. L.*, 216.)

60 The power of the Provost to punish offenders was not sanctioned by the Articles of War until 1829. Before that date it was exercised on the authority of the General without the recognition of the law. The power of the Provost-marshal to punish "on his own authority" is not only not allowed, but is expressly forbidden by the Army Act. (*A.* 74, 2.)

There can be no doubt that the commander of an army in the field has power to inflict summary punishments, even to death, without trial, should the circumstances justify such actions.

When the Duke of Wellington raised the questions in 1809, Lord Castlereagh took legal advice from the Judge-Advocate and the Attorney- and Solicitor-Generals, and wrote:—"They seem fully impressed with the persuasion that *the power of summary punishment, even to death, must reside in the commanding officer of an army in the field;* but in what precise mode, or under what particular circumstances to be exercised, they can give no opinion." Further, "they have reason to believe that such powers have been in very general use in the field; and they know of no instance in which the acts so done in the face of the army, for the preservation of its discipline, have ever been subsequently questioned."

1. The absolute necessity for stern and immediate repression of plundering and outrage in time of war was so deeply felt by the authorities of the United States, that in the 'Instructions for the Government of Armies of the United

States in the Field,' approved by the President, and issued in 1863; after decreeing in Article 44 the penalty of death for all wanton violence committed against persons in the invaded country, or destruction of property not authorized, "even after taking a place by main force," and "all rape, wounding, maiming, or killing of such inhabitants," it states, "a soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior." (*Halleck*, ii. 41.)

61 The exercise of summary authority by a British General, in command of a British army on active service, would not be taken cognizance of by the civil courts.

Flagrante bello, the common law has never interfered with the army: indeed the maxim *Inter arma silent leges* forbids such interference. (*Clode, M. F.*, ii. 177.)

1. In the great case of Johnstone *v.* Sutton, which went to the House of Lords, and is the leading case on the subject, it was solemnly held, in accordance with the case just cited, that for the abuse of a military discretionary power in time of war, the courts of common law have no original jurisdiction; for that what was an abuse, and whether it was abuse or not, is a question so much dependent upon military exigencies and military considerations, that a court of common law will not take cognizance of it, and a jury could not judge of it. (*Finlason*, p. 3, *a.*)

CIRCUMSTANCES JUSTIFYING EXECUTION WITHOUT TRIAL.

62 In the case of the execution of an offender without trial, as in all others of a similar nature, the law recognizes no power of dispensing with its own forms. The officer who so acts does so on his own responsibility, and must rely on the circumstances under which he acts for his justification.

1. Lord Castlereagh, in the above-quoted correspondence, gives as the opinion of the law officers :—" They consider that the necessity of the case can only be the rule, and that the power must be regulated by the conscientious sense of the commander, and of course upon his responsibility. They admit that this is a painful duty, and of some hazard to an officer to undertake ; but they say, at the same time, that to be effectual it must be both summary and arbitrary, and that it is impossible in this constitution, that such power should be entrusted, *à priori*, to any man." (*Clode, M. F.*, App. cxii. 4.)

USE OF FORCE BY SENTRIES.

63 The Duke of Wellington wrote (*Despatches*, vol. iii. pp. 612-13) of the status of sentries as follows :—" I consider a sentry as a depositary of the public authority at his station, that all men, however high their rank, are bound to obey." In considering the extent to which sentries can legally use force in carrying out their orders, a distinction must be made between the power possessed by the military over persons subject to military law, or alien prisoners of war, and over those who are " civilians."

64 *Towards persons subject to military law.*—Every sentry or guard is posted with definite orders which are assumed to be lawful commands under the Army Act. (*A.* 9, 2.) These the sentry is bound to enforce, and all persons subject to military law are bound to obey.

If, therefore, any such person disobeys these orders, the sentry, or rather the commander of the guard upon the warning of the sentry, has authority under the 45th section of the Army Act to place the offender in arrest or confinement until released by the commanding officer, or tried by court-martial. (*Clode, M. F.*, App. G. G.)

1. A case very recently occurred at Woolwich. A private soldier was posted as sentry over a magazine with orders to prevent any unauthorized persons approaching it. On seeing a figure coming towards his post during the night, which was a dark one, he brought down his bayonet to the charge, and called out, "Who comes there?" three times. The figure closed with him, and was thrust through by his bayonet. The sentry called the guard, and on their arrival it was discovered that the wounded man was one of the guard, who apparently had tried to frighten his comrade on sentry. The unfortunate man died a few minutes after his discovery. On the sentry being brought before a magistrate, evidence was given of the facts and of the orders given to the sentry on mounting. The magistrate dismissed the case on the ground that the sentry was justified in carrying out his orders.

65 *To prevent escape of prisoners.*—What degree of force a sentry may use to capture or prevent the escape of prisoners in his charge is open to controversy. In 1806 a corporal of the 58th Regiment was tried by the civil power, but acquitted, for shooting at a deserter prisoner escaping from his escort. (*Clode, M. F.*, App. G. G.)

1. Of this case Sir Charles Napier wrote:—"He suffered imprisonment and great anxiety of mind for doing that, which if he had not done, he would have been tried by military law, degraded, and possibly flogged. When the corporal shot a soldier—a man of his own society, by the laws of which both were bound to act, and which laws are given us by the same authority which enacts the social laws—it was surely inconsistent and unjust that his life should depend upon the opinion of twelve jurors, men ignorant of our military laws and customs." (*Clode, M. F.*, App. G. G.)

66 If a sentry be posted over *prisoners of war*, the rules of the service would, it is presumed, justify his shooting them to prevent their escape; for sentries who, in

obedience to their military orders, shot the French prisoners who were in England attempting to escape, were defended by the Secretary of War against the charge of murder or manslaughter. (*Clode*, App. G. G.)

1. In 1807 Ensign Maxwell, of the Lanarkshire Militia, was tried before the High Court of Judiciary in Scotland for the murder of Cottier, a French prisoner of war, at Greenlaw, by improperly ordering a sentinel to fire into the room where Cottier and other prisoners were confined. Ensign Maxwell had the military charge of over 300 prisoners confined in a building of no great strength. The prisoners were of a turbulent character, and to prevent their escape an order was given that all lights in the prison should be put out at nine o'clock, and that if this was not done at the second call the guard was to fire upon the prisoners, who were often warned of this order. Ensign Maxwell having observed one night, on which there had been some disorder among the prisoners, a light burning beyond the appointed hour, twice ordered it to be put out, and not being obeyed, directed the sentry to fire, but the musket merely snapped. Ensign Maxwell repeated the order; the sentry fired again, and Cottier received his mortal wound. At this time there was no symptom of disorder in the prison, and the prisoners were all in bed.

   The Lord Justice laid down that Ensign Maxwell could only defend himself by proving specific orders, which he was bound to obey without discretion, and which called upon him to do what he did. The order, however, was not contained in the instructions from the Adjutant-General, but was a mere verbal one, given by the corporal to the sentries in the hearing of the officers. The jury found him guilty of culpable homicide, with a recommendation to mercy, and he was sentenced to nine months' imprisonment. (*M.* viii. 95.)

67 When military are permanently quartered, in *civil or military gaols*, or are specially sent thereto in aid of the Governor, the keeper of such prison is to be considered as a

civil officer, and his assistants also act in a character merely civil, whether he or they be or be not soldiers. Firing upon prisoners attempting to escape is only justifiable when, after proper precaution has been taken to prevent escape, prisoners rise upon their keeper, or otherwise attempt their escape. In such case it is justifiable to use such degree of force as is necessary to suppress and retain them. (*Clode, M. F.*, App. G. G.)

68 *To enforce obedience to their orders.*—A sentry using force will in general not be justified by showing that he acted under the orders of some superior civil or military authority; his justification will depend upon the same considerations as though he had acted entirely on his own responsibility, and the fact of his having received the orders will merely be of importance as a fact in the case which may throw light upon the state of his mind as to reasonable belief, intent, or otherwise. (*M.* vii. 55.)

1. In the case of R. *v.* Thomas, the prisoner, a sentinel on board H. M. ship 'Achille,' had been ordered to keep off all boats unless they had officers in uniform in them, or unless the officers on deck allowed them to approach: and he received a musket, three blank cartridges, and three ball cartridges. The boats pressed, upon which he repeatedly called to them to keep off; but one of them persisted, and came close under the ship, and he then fired in the boat and killed the boatman. The jury found that he fired under the mistaken impression that it was his duty, and the case being reserved for the opinion of the Judges, their Lordships were unanimous that it was murder, but thought it a proper case for a pardon. *Further, they were of opinion that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentry would have been justified.* (*M.* viii. 97.)

69 *To prevent trespass.*—As a caretaker in charge, and in peaceable possession of Crown property, with orders to

prevent trespass or entry, a sentry may, if it be a house or enclosure, defend this possession by force, using, however, only such amount of force as is absolutely necessary to preserve the property from trespass. (*Clode.*)

1. A person who is in peaceable possession of property of any description is entitled to defend it against trespassers, and to use force for the purpose of removing them from his land, or of retaining or re-taking his goods from them; but he must not intentionally strike out or hurt an ordinary trespasser unless he is resisted, in which case he may use such force as is reasonably necessary to overcome such resistance, though even in this case, unless himself assaulted, he must not intentionally inflict death or grievous bodily harm. If, however, the trespass is a serious one, as when a trespasser endeavours forcibly to break and enter a dwelling-house with the intention of committing an indictable offence therein, any amount of force may be used to prevent him. (*M.* vii. 65.)

70 To prevent an entry, the sentry may place himself before the person entering, and his doing so will be no assault, but even if the entering into an enclosure be made with a felonious intent, or if the intruder be escaping with stolen property, *the sentry would not be justified in shooting him*, though he had no other means of bringing the offender to justice. (*Clode, M. F.*, App. G. G.)

1. Although a sentry may forcibly remove a trespasser, he has no authority even if assaulted by him for taking him into custody; all that he can do is to crave the aid of the civil power, and hand the offender over to a peace officer. (*Clode, M. F.*, App. G. G.)

71 The law on this subject would appear to indicate that an armed sentry is very inferior to a policeman, or even a civil watchman, as a guard against trespass by civilians.

72 *In self-defence.*—"To justify the use of a weapon in defence of his life, a person must satisfy the jury that the defence was necessary; that he did all he could to avoid it; and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape in such case, if he retreated as far as he could, he will be justified."

1. "But if," writes Lord Hale, "a thief assault a true man, either abroad or in his house, to rob or kill him, the true man is not bound to give back, but may kill the assailant, and it is not felony." (*Clode, M. F.*, App. G. G.)
   The above law answers equally for sentries as for other persons.

73 In time of war, in the heat of action, force has frequently been used towards offenders, and no doubt would be again; such cases do not appear ever to have come before the courts of law, but where sufficient reason could be shown would probably be justified under the law of necessity.

1. Sentries, in time of war, have frequently shot prisoners attempting to escape. The law of war is, that a prisoner of war attempting to escape may be shot in the act, after he has once been summoned to stop, and has not done so.
2. Mutineers or deserters have been shot while in the act. An officer who, on the 27th of September, 1775, shot down one of four sailors leaving the ship as deserters (like a good officer) was acquitted with honour by a naval court-martial. (*Clode.*)
3. The American instructions to general officers in the field (Art. 44), lay down that a soldier, officer or private, in the act of plundering or the committal of outrage, who disobeys a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

74 Soldiers have been slain by officers for disobedience of orders in action. There appears to be no actual record of any such cases occurring with British troops, although it is sufficiently certain that there have been such. The following proofs are given of similar actions in foreign services :—

1. At the battle of Lutzen in 1632, during the Thirty Years' War, after the death of Gustavus Adolphus, the command of the Swedish army was taken by Duke Bernard of Wiemar. Discouraged by the King's death, those about him suggested retreat. The fiery duke answered that it was a question of vengeance and not of retreat, and ordered the lieutenant-colonel of the Steinbock regiment to advance. On that officer hesitating to obey the order, Duke Bernard at once ran him through the body, and placing himself at the head of the regiment, led a victorious charge. (*Denison's History of Cavalry*, p. 267.)
2. In a charge of cavalry, it being indispensably necessary that the scouts in front should retire by the flanks, and not throw the line into confusion by falling back on it, in the cavalry of Frederick the Great the squadron-leader was authorized to sabre any *éclaireur* met riding at random across the front. (*Von Schmidt on Cavalry*, p. 73.)
3. Lieutenant-Colonel Von Boguslawski in his instructions for the conduct of the infantry soldiers in action says :—"Whoever runs away from the fight, or induces his comrades to do so by shouts, or whoever throws away his arms, will be cut down forthwith by the nearest superior officer." (*R. U. S. Inst. Journal*, vol. xxvii. p. 537.)

CHAPTER IV.

REPLACEMENT OF ORDINARY LAW BY MILITARY FORCE.

75 The reign of law is essential to the existence of society. Under normal conditions the jurisdiction of the ordinary law provides all that is required; when, however, the ordinary law is overpowered and its operation for the time suspended, necessity arises for some stronger rule which shall repress outrage and disorder while it is in abeyance, and restore the action of the ordinary law.

This necessity is supplied by the arbitrary power assumed for the purpose by the powers that be, or the authority armed at the time with the force required to sustain it.

The rule so exercised by this authority is usually called "Martial Law." It may be said then, that *Martial Law is the rule substituted for ordinary law when the jurisdiction of the latter is suspended.*

NECESSITY OF MARTIAL LAW.

76 "It is manifestly in the interest of those under its care that every government, whatever its form may be, must possess the power of resorting to force in the last extremity. The want of such a power would place the very existence of the State at the mercy of organized conspiracy. The public safety, therefore, which is the ultimate law, confides to the supreme authority in every country the power to

declare it when the emergency has arisen." (*Charge of Mr. Justice Blackburne in Jamaica case.*)

1. The right to declare, apply, and exercise Martial Law, is one of the rights of sovereignty, and is as essential to the existence of the State, as is the right to declare or carry on war. (*Halleck*, i. 508.)

MEANING OF THE TERM "MARTIAL LAW."

77 In order properly to understand the meaning of the term "Martial Law," it is necessary to know something of its origin.

During the early days of English History, no standing army existed. It was only in times of war or of insurrection that military forces were raised; consequently, in time of peace there was no army, and consequently no need for a law to govern it.

78 The special authority, or "Law of the Marshal," which ruled under the prerogative of the Crown during war or insurrection, included both the rule necessary for the government of the army, and also for the government of the occupied territory or disturbed district while the ordinary law was in abeyance. The expression "Martial Law," in consequence, became a term signifying, both the rule or law which governed during times of disturbance the population generally, and also the law for the government of the forces raised for the occasion.

79 When a standing army was first established in England, this term "Martial Law" continued to be applied to the rule by which the army was governed, both in war and peace, and at the same time retained its meaning as the special government established for disturbed districts during times of war and insurrection.

This original double meaning of the term "Martial Law" has led to misunderstanding as to its present meaning, and

to the confusion, by many writers, of "Martial Law" with "Military Law."

80 To render the difference between these terms clear, the distinction between them will be here explained.

Military Law is the law which governs the soldier during war and peace, at home and abroad. For the British Army it is contained in the Army Act, and is part of the Statute Law of the Empire.

81 *Martial Law*, whatever its original meaning may have been, and however it may in time past have been confused with Military Law, is now distinctly understood to be the term adopted to describe the authorized use of military force and jurisdiction when all law is in abeyance.

1. Sir Charles Napier, in his *Remarks on Military Law*, p. 2, after speaking of Civil Law and Military Law as distinct, refers to "Martial Law" as "in truth no law at all. It is merely a term applied to that Act of the Legislature which suspends social law, and places the people at the will of the military, or other chief." He then goes on to say, that he considers the expression "Martial Law" is inaccurate, and that "the just term for such a lawless state is despotism; as no law but that of might exists. Such a state may be one of more or less injustice according to the will of those who hold this absolute power; but it is clear that the will of such persons is the law, and that there is no other law."
2. Other persons have described Martial Law in similar terms as being no law, and there is an inclination on the part of some to attempt to discard the term, without replacing it, or by replacing it with such term as the "Law relating to Insurrection," or the "Law of War," terms which have distinct meanings of their own, and do not describe what is now meant by Martial Law.
3. It appears hardly correct to state that Martial Law is no law at all. It is true that much is left to the will, or rather to the discretion, of the military commander, but he cannot exercise his will without limit. He is responsible

to his Sovereign, to his country, and to the authority who has directed him to act. He is limited, in case of insurrection, by the conditions under which Martial Law is proclaimed, and in case of war, by the Law of Nations. He is, further, in all cases limited by the law of natural justice to use no greater violence than is necessary to carry out the object for which Martial Law is being used, whether this concerns the safety of the State or the safety of the force under his command.

82 *Martial Law* prevails only during times of disturbance when the ordinary law is suspended, and may be applied both to civilians and to soldiers.

1. "It is necessary," said Sir D. Dundas, as Judge-Advocate-General in 1850, "to distinguish between Military and Martial Law. 'Military Law' is to be found in the Mutiny Act and Articles of War. Those, and those alone, it is which are properly called the Military Code, and by which the land forces of Her Majesty are regulated. 'Martial Law' is not a written law: it arises on a necessity, to be judged of by the Executive, and ceases the instant it can possibly be allowed to cease. 'Military Law' has to do *only* with the land forces mentioned in the 2nd section of the Mutiny Act. 'Martial Law' comprises all persons, whether civil or military." (*Clode, M. and M. L.*, 157.)
2. The confusion of the meaning of the terms Military and Martial Law is well shown by the fact that the Duke of Wellington, when writing from Portugal in April 1810, relative to the exercise of Martial Law towards the civil inhabitants of the country, writes of it as "Military Law" (*Selected Despatch*, No. 383), while an encyclopedia of very recent date speaks of Military and Martial Law as identical. (*Haydn's Dictionary of Dates.*)
3. Military Law exists equally in peace and war, and is as final and definite in its provisions as the Admiralty, Ecclesiastical, or any other branch of law, and is, equally with them, a part of the general law of the land. Martial Law is quite a distinct thing; it exists only in a time

of war, and originates in military necessity. It derives no authority from the civil law (using the term in its mere general sense), nor assistance from the civil tribunals, for it over-rules, suspends, and replaces both. It is from its very nature an arbitrary power, and extends to all the inhabitants, whether civil or military, of the district where it is in force. (*Halleck*, i. 499.)

MARTIAL LAW CANNOT BE IGNORED.

83 The Official Manual of Military Law lately issued gives no account of Martial Law, nor any instructions as to the way it is to be administered by the military authorities entrusted with its execution. The reason given for this being that "Martial Law, as distinguished from Military Law and the customs of war, is unknown to English jurisprudence" —the English law never presupposing the possibility of civil war.

It will be seen, however, from the instances quoted hereafter, that insurrection, interfering with the execution of ordinary law to such an extent as to necessitate that temporary replacement of the civil by military authority, commonly called "Martial Law," has occurred on many occasions within the dominions of the Crown, and on several occasions within the United Kingdom itself. It has been thought desirable, therefore, to describe the circumstances which call for its use, and the mode in which it should be proclaimed and administered.

1. As Major Pratt has said in his *Handbook on Military Law*: "No judicial decisions can alter the fact that the application of military government under the law of necessity, commonly called Martial Law, must always exist, although it is difficult exactly to define it."
2. That Martial Law has been, and may be again proclaimed, when necessity arises, and under proper restrictions as to its duration, is acknowledged by even so great a constitutional

authority as Hallam in his *Constitutional History*, as follows :—

"There may, indeed, be times of pressing danger when the conservation of all demands the sacrifice of the loyal rights of a few ; there may be circumstances that not only justify, but compel, the temporary abandonment of constitutional power. It has been usual for all governments during an actual rebellion to proclaim Martial Law, or the suspension of civil jurisdiction. And this anomaly is very far from being less indispensable at such unhappy seasons, in countries where the ordinary mode of proceeding is by jury, than where the right of decision resides in the Judge. But it is of high importance to watch with extreme jealousy the disposition towards which most governments are prone, to introduce too soon, to extend too far, to maintain too long, so perilous a remedy."

84 Martial Law is, no doubt, a great evil where it can be avoided, and only justifiable by absolute necessity, but the history of the past tells us that the summary power conferred by it is occasionally essential for the safety of the community at large, and the only means of averting wholesale outrage and rapine.

The greatest care should be taken to limit the jurisdiction of Martial Law to the narrowest bounds practicable to attain the required end, and every means should be taken by those in command to prevent the extraordinary powers exercised degenerating into brutality.

85 Perhaps the best means of doing this is to exercise judgment in the selection of those persons to whom the execution of Martial Law is entrusted. Only men of honour and integrity and accustomed to a sense of responsibility are in any degree fitted for so trying a situation, and such men will best be found among commissioned officers of the regular forces, naval and military, of some standing and experience, and accustomed to command.

It would appear that it is principally owing to the action of the subordinates employed under it that Martial Law has received the stigma attached to it in the public estimation. Thus, one of the principal causes of the public excitement and horror in the case of the exercise of Martial Law during the Jamaica insurrection in 1865, was caused by a private letter written by the commanding officer of a local corps of irregular troops which got into the papers. It contained the following :—

1. "On our march from Morant Bay we shot two prisoners, and catted five or six and released them, as these latter were only charged with being concerned in plundering —not murderers. This morning we made a raid with 30 men, all mounted, and got back to head-quarters, bringing in a few prisoners, and having flogged nine men and burned three negro houses and then had a court-martial on the prisoners, who amounted to about 50 or 60. Several were flogged without court-martial, from a single examination. One man, John Anderson, a kind of parson and schoolmaster, got 50 lashes; nine were convicted by court-martial, one of them to 100 lashes, which he got at once; the other eight to be hanged or shot; but it was then dark, so their execution was postponed till morning. We quarter on the enemy as much as possible; small stock, turkeys, &c., we take *ad libitum;* other supplies we give receipts for. We press all the horses and saddles we can find; but the black troops are more successful than ours in catching horses; nearly all of them are mounted. They shot about 160 people on their march from Port Antonio to Manchioneal, hanged seven in Manchioneal, and shot three on their way here.

"This is a picture of martial law: the soldiers enjoy it, the inhabitants have to dread it; if they run on their approach, they are shot for running away." (*Finlason's Treatise,* p. 242 *a.*)

It is obvious that a person who wrote under such circumstances in such a spirit of complaisant levity, was unfit to be entrusted with the tremendous powers of Martial Law.

2. A despatch from an officer, also written during the Jamaica insurrection, thus describes the evidence on which some prisoners were executed :—

"I must not forget to tell you that I have got Paul Bogle's valet for my guide, a little fellow of extraordinary intelligence. A light rope tied to the stirrup, and a revolver now and then to his head, cause us to understand each other, and he knows every single rebel in the island by name and face, and has just been selecting the captains, colonels, and secretaries, out of an immense gang of prisoners just come in here, whom I shall have to shoot to-morrow morning."

86 Such letters are forcible evidence of the spirit engendered in some minds by the exercise of irresponsible power of life and death; but it can hardly be supposed that men of honour and education, with the spirit of responsibility and justice taught by the continued exercise of naval or military authority, could become so oblivious to the most elementary rules of common justice.

87 It must not be forgotten, however, when considering the use of Martial Law, that in cases of serious insurrection, the use of force and the taking of life by military measures is often absolutely necessary for the public safety, and is universally acknowledged so to be. It is not a choice between the exercise of military authority under Martial Law, and the continued jurisdiction of the civil law. In such cases the latter is totally impossible, and the question really is between the exercise of military force, under the restraints of Martial Law, and its exercise without restraint of any kind.

That the restraints under Martial Law are so slight and so uncertain, must be attributed in great measure to the tendency to attempt to ignore the existence of such a thing as Martial Law, in the teeth of the fact that it has been repeatedly used in the dominions of the Crown, and will certainly be used again should occasion for it arise.

88 It may be confidently supposed that if clear standing instructions as to the mode in which officers in command of troops and others should act under Martial Law had been issued before 1865, as has been done since by the Admiralty, the irregularities justly complained of in its exercise during the insurrection in Jamaica would never have occurred at all, or at all events to nothing like the same extent.

1. The Royal Commission of Enquiry on the Jamaica Insurrection said in their report :—" We think that much which is now lamented might have been avoided, if clear and precise instructions had been given for the regulation of the conduct of those engaged in the suppression, and every officer had been made to understand that he would be held responsible for the slightest departure from those instructions. It does not seem reasonable to send officers upon a very difficult, and perfectly novel service, without any instructions, and to leave everything to their judgment." (*Finlason's Treatise*, p. 423 *a.*)

NATURE OF MARTIAL LAW.

89 "Martial Law is the assumption, by the officers of the Crown, of the absolute power exercised by military force, for the suppression of insurrection, and the restoration of order and lawful authority. The officers of the Crown are justified in any exertion of physical force, extending to the destruction of life and property to any extent, and in any manner that may be required for the purpose, but they are not justified in the use of excessive or cruel means, and are liable, civilly and criminally, for such excesses." (*Legal opinion in Jamaica case. Finlason's Treatise*, p. 254.)

Practically, in England and the United States, the essence of Martial Law is the suspension of the privilege of the writ of *habeas corpus*,—that is, the withdrawal of a particular person, or of a particular place or district of country from

the authority of the civil tribunals. A mere declaration of Martial Law would be utterly useless unless accompanied by a suspension of the privileges of the writ of *habeas corpus;* for, if the local civil authorities were permitted, in such a case, to enforce this writ, they might, and some probably would, render the military powerless to provide for the public safety. (*Halleck*, i. 502.)

1. "Martial Law exercised against enemies or rebels is only a more regular and convenient mode of exercising the right to kill in war: a right originating in self-defence, and limited to those cases where such killing is necessary, as the means of insuring the end. Martial Law put in force against rebels can only be exercised as a mode of more deliberately and equitably selecting the persons from whom quarter ought to be withheld, in a case where all have forfeited their claim to it. It is nothing more than a sort of better regulated decimation, founded upon choice instead of chance, in order to provide for the safety of the conquerors without the horrors of undistinguished slaughter. It is justifiable only when it is an act of mercy. Thus the matter stands by the law of nations." (*Sir J. Mackintosh in Demerara Debate.*)
2. The same idea is expressed by Finlason, who writes thus of courts held under Martial Law:—"They interpose some breathing time, so to speak, amid the wild excitement of the moment, some check upon unbridled massacre, some opportunity for reflection and selection, and for the exercise of clemency and humanity; and they tend thus, if rightly regulated, to the diminution and not to the augmentation of the sacrifice of human life." (*Finlason, Commentaries*, page 50.)

90 The nature of Martial Law within the British dominions may, perhaps, have some light thrown upon it by describing the analogous state of affairs elsewhere.

1. General Halleck, of the United States, in his work on International Law, says of Martial Law in the sense of the exercise of force in case of rebellion:—"In the

jurisprudence of France three conditions of things are carefully defined and provided for.

1st. *The State of Peace*, where all persons are governed by the civil or military authority, according to the class to which they belong, and the law applicable to the particular case.

2nd. *The State of War*, where the law and authority governing depend upon the particular condition of the place and circumstances of the case, the civil authority sometimes acting in concert and sometimes in subordination to the military.

3rd. *The State of Siege*, when the civil law is suspended for the time being, or, at least, is made subordinate to the military, and the place is put *under Martial Law*, or *under the authority of military power*. This may result from the presence of a foreign enemy, or by reason of a domestic insurrection, and the rule applies to a district of country as well as to a fortress or city. A similar system is adopted in Spain, and in most of the countries of Continental Europe.

"*The State of Siege* of the Continental jurists," says Cushing, the American Legist, "*is the proclamation of Martial Law of England* and the United States; only, we are without law on the subject, while in other countries it is regulated by known limitations." (*Halleck*, i. 499.)

2. The existing French law respecting the state of siege, which is analogous to Martial Law in British possessions, is laid down in the law of the 9th August, 1849, thus:—

Art. 1. The state of siege can only be declared in case of imminent danger to interior or exterior security.

Forms of Declaration of a State of Siege.

Art. 2. The National Assembly can alone declare a state of siege, except in the cases hereafter specified. The declaration of a state of siege names the communes, arrondissements or departments to which it applies and will be extended.

Art. 3. Should the National Assembly be prorogued, the President of the Republic can declare a state of siege with the advice of his council of ministers.

The Effect of a State of Siege.

Art. 7. Immediately that a state of siege is declared, the powers with which the civil authority was possessed for the maintenance of order and for police purposes, passes entirely to the military authority. The civil authority continues, nevertheless, to exercise such of these powers as the military does not assume.

Art. 8. The military tribunals may take note of crimes and outrages against the safety of the Republic, against the Constitution, against order and the public peace, whatever may be the rank of the principal authors and their accomplices.

Art. 9. The military authority has the right:—1st. To make search, by day or night, in the dwellings of citizens. 2nd. To send away returned convicts and individuals who have not their domicile in the places submitted to a state of siege. 3rd. To order the giving up of arms and ammunition, and to proceed to search for and remove them. 4th. To forbid all publications and meetings that it considers of a nature to excite or support disorder.

Art. 13. After the raising of a state of siege, the military tribunals continue to have cognizance of the crimes and outrages whose trial has been committed to them. (*Instructions en cas de troubles*, 1883, p. 31.)

LIMITS TO POWER UNDER MARTIAL LAW.

91 The exercise of Martial Law is subject to such restrictions and rules as the State may lay down; failing such restrictions the power conferred by it is limited by the international laws and usages of war.

In the charge delivered by Mr. Justice Blackburne, in the Jamaica case, in the exercise of Martial Law, he thus laid down the limits to be followed:—"Although Martial Law dispenses with the forms and delays which appertain to the ordinary criminal jurisprudence, it does not, therefore, au-

thorize or sanction every deed assumed to be done in its name. It stops far short of that. For if it did not, lawless men, under colour and putting forward the pretence of authority, might commit acts abhorrent to every principle of humanity. They might gratify malice and revenge, hatred and illwill, lust and rapacity. They might perpetrate deeds from which the sun would hide its face. *No greater error exists than to suppose that the subjecting of a district to the military power authorizes excess on the part of those who administer that power.*"

1. He goes on to say, that Martial Law sanctions "everything that is necessary towards putting down actual resistance to lawful authority." "It requires that the acts of its ministers should be honest and *bonâ fide*," and the acts of its agents must be such as will be judged to be necessary, not by a violent and excited, but by a moderate and reasonable, man. "If these conditions are not fulfilled the act becomes simply unlawful, with all the consequences attaching to illegality. The vindictive passions are prohibited their exercise as absolutely and peremptorily during military rule as in the most orderly and tranquil condition of human affairs. No amount of personal provocation can justify or excuse vindictive retaliation." (*Charge of Mr. Justice Blackburne in Jamaica case.*)
2. Even when Martial Law is unrestricted by constitutional or statutory law, it must be exercised with due moderation and justice; and as paramount necessity alone can call it into existence, so must its exercise be limited to such times and places as this necessity may require; and, moreover, it must be governed by the rules of general public law, as applied to a state of war. (*Halleck*, i. 500.)

WHEN CAN MARTIAL LAW BE EXERCISED?

92 Martial Law, as already stated in its definition, can only be exercised when the jurisdiction of the ordinary law is suspended. Mr. Rolls, in the argument upon the Petition

of Right, after stating, "The question is now *when* this Martial Law is to be used, and upon whom?"—answers by saying:—"Martial Law is merely for necessity, where the common law cannot take place." He goes on to say that such necessity can only be in time of war, which he defines to be a time when the civil courts are not open, or when "the Sheriff cannot execute the King's writ." Further he says:—"If an enemy come into any part where the common law cannot be executed, there may the Martial Law be executed. If a subject be taken in rebellion, if he is not slain in the time of his rebellion, he is to be tried after by the common law."

1. According to the Army Act now in force (*A.* 190, 20), the expression "enemy" includes all armed mutineers, armed rebels, armed rioters, and pirates.
2. Sir Edward Coke on the same subject contended:—"The time of peace is when the Courts of Westminster are open . . . where the common law can determine a thing the Martial Law ought not. When the Courts are open, Martial Law cannot be executed."
3. The rule that Martial Law cannot be exercised when the courts of law are open may, however, be put to one side by special enactment of the Legislature; thus, in the Irish Act of 1799, it was declared "that Martial Law should prevail, and be put in force whether the ordinary courts of common or criminal law were or were not open." (*Clode, M. F.*, ii. 171.)

93 The preamble to the Annual Army Act at present in force, in the same manner declares Martial Law to be illegal in time of peace.

1. Simmons says as to this as it stood in the Mutiny Act:—"The preamble indirectly recognizes the legality of resorting to this expedient (Martial Law) in time of war and rebellion, or armed rising, which is levying war against the Crown. No legal dogma can be clearer, and being each year recognized by Parliament, it is entitled to all the deference which may

be due to an Act of the Legislature so repeatedly revised and considered." The fact that when the law relating to the army was entirely recast in 1879, these words were retained, adds considerably to the force of the above remark.

2. The view of Martial Law as illegal in time of peace is very ancient. Thus in the 14th year of Edward II. Thomas of Lancaster being taken in open insurrection was by judgment of Martial Law put to death, which was adjudged to be unlawful because, as Lord Coke states, the execution was in time of peace. Again, in the 15th year of the same reign, Edmund, Earl of Kent, being taken at Pomfret, the King gave sentence of death against him in a kind of military court by a summary proceeding. This judgment was reversed in Parliament, because, when it was given, it was a time of peace. Lord Hale says of this case :—" That judgment was reversed; for Martial Law, which is indulged rather than allowed, and that only in case of necessity, in time of open war, is not permitted in time of peace." (*Finlason, Com.* 76.)

3. Mr. Justice Davis, a United States Judge, in deciding an important case brought before him in 1865, as to the arrest and trial by military commission of a man named Milligan during the Civil War, spoke thus :—" If in foreign invasion or civil war the courts are actually closed, and it is impossible to administer criminal justice according to law, then, in the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by Martial Rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for if this government is continued after the courts are reinstated it is a gross usurpation of power. Martial Rule can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." (*Halleck*, ii. 455 *n.*)

94 We may, then, assume that Martial Law can only be exercised by the law of England in time of war, and such

time of war may be taken legally to mean a time when the process of the ordinary law is inoperative. Mr. Curran, when arguing in support of the application for *habeas corpus* in Wolf Tone's case before the Queen's Bench in Dublin, said:—"In times when war was raging, when man was opposed to man in the field, courts-martial might be endured; but every law authority is with me while I stand upon this sacred and immutable principle of the constitution, that Martial Law and Civil Law are incompatible; and that the former must cease with the existence of the latter." (*Clode, M. F.*, ii. 170.)

1. The meaning of the term "time of war" is thus given in *Wood's Institutes*, B. 1, c. v.:—"When the courts of justice are open to distribute justice to all, it is said to be a time of peace. But when, by reason of rebellion, &c. the peaceable course of justice is stopped, then it is said to be a time of war." (*Finlason's Treatise*, p. 3.)
2. Finlason remarks that the legal meaning of the phrase, *the courts of law are open*, is, really and practically open for remedy or redress, so that the common law can have its course. He quotes Lord Coke in his first Institute to the following effect:—"When the courts of justice be open, and the Judges and Ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So when, by invasion, insurrection, rebellions or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be as it were shut up, *et silent leges inter arma*, then it is said to be time of war." (*Finlason, Com.* 82.)

95 In order to ascertain the occasions on which Martial Law can be exercised, we must therefore consider the circumstances which render the operation of the ordinary law impossible. This may be by reason either of war or of insurrection rendering the civil authority powerless for the time. Martial Law, in the sense of the treatment accorded to enemies

in time of war with a foreign foe, is governed by the international laws of war, and is treated of in the second part of this book. The other occasions for the exercise of Martial Law may be considered under two heads, viz.:—

1st. Martial Law within the dominions of the Crown.

2nd. Martial Law when an army is occupying foreign territory.

It will be better to deal first with the exercise of Martial Law within the dominions of the Crown.

MARTIAL LAW WITHIN H. M.'S DOMINIONS.

OCCASIONS FOR ITS USE.

96 The occasions which may arise for the exercise of Martial Law within H. M. dominions are best illustrated by a statement of those instances in which it has actually been put in force in recent times. These instances will be found given in Chapters V. and VI., the former giving the cases occurring within the limits of Great Britain and Ireland, the latter those cases which have occurred in our Colonies. The nature of the occasions justifying the use of Martial Law depends on the principles already laid down.

1. The use of Martial Law under the prerogative of the Crown, as stated by the law officers of the Crown in 1838, "can only be tolerated because, by reason of open rebellion, the enforcing of any other law has become impossible." "When the regular courts are open, so that criminals might be delivered over to them to be dealt with according to law, there is not, as we conceive, any right in the Crown to adopt any other course of proceeding. Such power can only be conferred by the Legislature." Again, "Martial Law can never be enforced for the ordinary purposes of civil or even criminal justice, except in the latter so far as the necessity arising from actual resistance compels its adoption." (*Clode, M. F.*, ii. 500.)

2. Sir James Mackintosh, in the debate on the Demerara case of 1823, spoke thus:—"When foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them." (*Clode, M.F.*, ii. 486.)
3. Martial Law becomes necessary also in that portion of a country invaded or besieged by an enemy. "The relations of the Government to a place or territory so occupied or situated, are of a military character, and consequently are not regulated by the civil laws, which are made for the condition of peace . . . the *fact* of the invasion or beleaguerment is in itself a substitution of military for civil authority; the absence of peace suspends the law of peace, and the presence of war substitutes military rule." (*Halleck*, i. 498.)

OBJECT OF PROCLAIMING MARTIAL LAW,

97 The object of the exercise of Martial Law may be, and generally is, in cases of rebellion, to enable persons resisting the authority of the Government to be arrested summarily and punished promptly. In some cases, as in cases of foreign invasion, it may be chiefly for the purpose of enabling the forces of the country to be better utilized for its defence.

1. Thus the proclamation of Martial Law at the Cape in 1835 stated that owing to the outrages and devastation committed by tribes entering the colony, "it has become absolutely necessary to embody the inhabitants of the several districts to aid H. M. Forces in the expulsion of the invaders;" therefore in order "to secure the efficient services of the inhabitants and due obedience on their part, Martial Law was proclaimed." (*Clode, M. F.*, ii. 503.)
2. Again, in 1846, at the Cape, the object of proclaiming Martial Law was stated to be "for all cases, and in all matters connected with the assembling, embodying, conducting, and supplying H. M. Forces, and the inhabitants who shall be enrolled and embodied." (*Clode, M. F.* ii. 505.)

JUSTIFICATION FOR ITS USE.

98 The only justification for the use of Martial Law within the dominions of the Crown is necessity. Sir James Mackintosh, speaking in 1824, in support of Mr. Brougham's motion condemning the use of Martial Law in Demerara, said on this point:—"The only principle on which the law of England tolerates what is called Martial Law is necessity; its introduction can be justified only by necessity; its continuance requires precisely the same justification of necessity; and if it survives the necessity on which alone it rests for a single minute, it becomes instantly a mere exercise of lawless violence." "Nothing but the necessity arising from the absolute interruption of civil judicature by arms, can warrant the exercise of what is called Martial Law. Wherever and whenever they are so interrupted, and as long as the interruption continues, necessity justifies it." (*Clode, M. F.*, ii. 486-7.)

1. In speaking of the suppression of the riots of 1780 by the military acting independently, Lord Thurlow (Lord Chancellor) argued this action to be justifiable because the military were only employed "after it had been in vain endeavoured to quell the riots by the intervention and authority of the civil power,"—"that there was an actual insurrection; that the laws of the land were trampled under-foot, and the King's Government opposed." (*Clode, M. F.*, ii. 167.)
2. Finlason says, p. 113 of *Commentaries*, on the same subject:—"The true ground, therefore, on which to base Martial Law is, that it is allowable when necessary for the suppression of rebellion, and the safety of the State, and that it is legal because it is necessary."
3. It having appeared that by a law of the Island of Antigua, the Governor was given standing power to proclaim Martial Law under certain circumstances: on the 30th January,

1867, the Colonial Secretary, Lord Carnarvon, addressed a circular despatch to the governors of Colonies, pointing out that such a permanent enactment was entirely at variance with the spirit of English law, and could only be justified where a chronic state of insecurity prevailed, which does not exist in any colony. He therefore requested that any such laws which might exist should be repealed, and concluded thus :—" I have only to add, that in giving these instructions, H. M. Government must not be supposed to convey an absolute prohibition of all recourse to Martial Law under the stress of great emergencies, and in anticipation of an Act of Indemnity. The justification, however, of such a step must rest on the pressure of the moment, and the Governor cannot by any instructions be relieved from the obligation of deciding for himself, under that pressure, whether the responsibility of proclaiming Martial Law is, or is not, greater than that of refraining from doing so." (*Clode, M. F.*, ii. 667.)

NECESSITY FOR THE PROCLAMATION OF MARTIAL LAW.

99 Where open rebellion exists, the Crown can proceed to suppress the same by force without any proclamation, although such proclamation may be desirable to give notice that such measures will be taken.

1. In the report of the law officers of the Crown (Campbell and Rolfe) on the proclamation of Martial Law by the Governor of Lower Canada in 1837, after giving it as their opinion that such proclamation was within his powers, they write :—" We must, however, add that in our opinion such proclamation confers no power on the Governor which he would not have possessed without it. The object of it can only be to give notice to the inhabitants of the course which the Governor is obliged to adopt for the purpose of restoring tranquillity. In any district in which, by reason of armed bodies of the inhabitants being engaged in insurrection, the ordinary course of law cannot be maintained, we are of opinion that the Governor may, even without proclamation, proceed to put down the rebellion by force of arms, as in the case of foreign invasion, and for that purpose

may lawfully put to death all persons engaged in the work of resistance." (*Clode, M. F.*, ii. 500.)

100 Such proclamation, however, is not, strictly speaking, legal, and requires subsequent legislative sanction. This is stated clearly in the despatch of the Duke of Newcastle to the Lieutenant-Governor of St. Vincent with regard to Martial Law there from 1862-4, thus :—

1. "In proclaiming Martial Law the executive authority in fact declares itself obliged, for the protection of the community, to neglect law, trusting to the legislature to relieve all who, in obedience to the constituted authority, may have acted in defence of the public safety, from the consequences of having acted unlawfully. The proclamation was right and necessary, but it was not strictly lawful." (*Clode, M. F.*, 511.)

WHAT POWER HAS AUTHORITY TO PROCLAIM MARTIAL LAW?

101 The Crown has authority to proclaim Martial Law against enemies or rebels openly resisting the Government, and even to use force against them without a proclamation, but this requires the subsequent sanction of the Legislature. In all other cases it is necessary that legislative sanction should be procured beforehand.

1. The preamble to the Irish Act of 1799 declaring Martial Law, speaks of "His Majesty's undoubted prerogative in executing Martial Law, for defeating and dispersing the armed and rebellious force, and in bringing divers rebels and traitors to punishment in the most speedy and summary manner." (*Clode, M. F.*, ii. 171.)
2. A clause was also added to the same Act as follows :— "That nothing in this Act contained shall be construed to take away, abridge, or diminish the acknowledged prerogative of His Majesty, for the public safety, to resort to the exercise of Martial Law against open enemies and traitors." (*Clode, M. F.*, ii. 172.)

3. Mr. Pitt, again, in introducing the Bill declaring Martial Law in Ireland in 1803, spoke of the power "to declare Martial Law in districts where insurrection exists" as "a power which His Majesty already possesses." (*Clode, M. F.*, ii. 174.)
4. Mr. Clode says:—"It cannot be doubted that the Crown, by the admission of Parliament, has the undoubted right of executing Martial Law for the defeat and dispersion of armed rebels." (*Clode, M. F.*, ii. 174.)

102 Within the dominions of the Crown, but out of the United Kingdom, a difference exists in the case of Crown and of settled colonies.

"A Crown colony is one which has been acquired by conquest, or what is considered equivalent to conquest, by cession from some other State or Power.

"A settled colony is a colony which is established where land has been taken possession of in the name of the Crown of England, and being unoccupied, has afterwards been colonized and settled upon by British subjects." (*Lord Chief Justice Cockburn. Clode, M. F.*, ii. 175.)

1. As to the classification of our colonies, Finlason says:—"Our colonies, or more correctly speaking, our dependencies, may be generally divided, as regards their political institutions, into three classes.

"(1) Dependencies possessing representative institutions under grant from the Crown. To this class belong Jamaica, and all the older West Indian colonies, all the North American colonies (except Canada and Newfoundland), the Cape of Good Hope, and Malta.

"(2) Dependencies of which the constitution has been established by Act of Parliament. (*a*) Such Act giving representative institutions where former Acts or other obstacles stood in the way, as in the case of Canada, Newfoundland, the Australian colonies (except Western Australia), and New Zealand. (*b*) Such Act establishing Crown or nominated councils, as in the case of Western

Australia, the West African settlements, St. Helena, Hong Kong, the Falkland Islands, and the countries of the East India Company.

"(3) Dependencies originally obtained by conquest, for which the Crown retains the power of legislation, and which are properly called 'Crown Colonies.' These are now Gibraltar, Heligoland, Ceylon, Mauritius, Natal, Trinidad, St. Lucia, and perhaps British Guiana. Laws passed in those dependencies in which representative governments exist are called 'Acts'; the laws passed in those in which it does not exist are called 'Ordinances.' Ordinances are simply confirmed or disallowed by the Crown, the pleasure of the Crown being signified by the Secretary of State." (*Finlason, Com.* p. 161.)

POWERS OF GOVERNORS OF COLONIES TO PROCLAIM.

103 The Governors of all colonies appear to possess all the prerogatives and powers of the Crown so far as is necessary to carry on the government and perform the duties connected with it, the first of which duties is the maintenance of peace and order. The question, therefore, of the power of the Governor appears to turn upon the powers and prerogatives of the Crown at common law. As it has been admitted on all hands that the common law authorizes the Crown to do all that is necessary to maintain the peace and to suppress rebellion, the question in a colony, as in the United Kingdom, resolves itself into whether a declaration of Martial Law in any given case is justified by necessity.

1. In every British dependency the personal authority of the Sovereign is represented and executed by the Governor, who is temporarily appointed by Royal Commission. He has the prerogative of summoning and dissolving legislative assemblies, of veto on all their Bills, of reprieve and pardon, of suspension for misconduct of all officers—civil, naval, and military—in his colony. He is Vice-Admiral within the limits of his government, also Captain-General and

Commander-in-Chief in all colonies except those where the Governor is of the rank of Colonel. The Governors of all the colonies except two are aided by an Executive Council.

POWER TO PROCLAIM IN COLONIES.

104 In such *Crown Colonies* as are acquired by conquest, except so far as rights may have been secured by any terms of capitulation, the power of the Sovereign is absolute, and Martial Law may be proclaimed at any time. (*Clode, M. F.*, ii. 176.)

1. Finlason says (*Com.* p. 158), that where colonies are conquered or ceded, "they retain their own laws until altered, and if originally settled by subjects of this country, they either receive such laws as this country may impose, or make their own. In neither case can the common law of England apply to the colony except by force of some express law either local or Imperial—so that the question practically is in each case, What is the law of the colony as a matter of fact?" Again, p. 160:—"In the case of a Crown colony, the question will be, what laws have been adopted or framed by the Colonial Legislature. In the case of a colony originally a Crown colony, and then having a constitution, the question will be, first, what laws the Crown declared, and then what laws the colony adopted."

105 In a *Settled Colony* the inhabitants have all the rights of Englishmen. They take with them the duties of allegiance and obedience to the lawful commands of the Sovereign, and obedience to the laws which Parliament may make with reference to the colony. On the other hand, they take with them all the rights and liberties of British subjects, and those rights and liberties against the prerogative of the Crown which they would enjoy in this country. Martial Law, therefore, can only be declared under the conditions existing

by the law of England, as altered or varied by local legislation. (*Clode, M. F.*, ii. 176.)

1. In the case of a constitutional colony, the question will be, what laws have been adopted and framed by the Colonial Legislature. (*Finlason, Com.* p. 160.)
2. Where open rebellion exists the Governor of a settled colony carries the prerogative of the Crown to declare Martial Law. This was shown by the report of the law officers of the Crown respecting the declaration of Martial Law by Lord Gosford in Canada in 1837, expressed as follows:—"The Governor of Lower Canada has the power of proclaiming, in any district in which large bodies of the inhabitants are in open rebellion, that the Executive Government will proceed to enforce martial law." (*Clode, M. F.*, ii. 499.)

MODE OF PROCLAIMING MARTIAL LAW.

106 The proclamation should be made by the Executive Government as the representative of the Crown. The military officer who carries out the orders of the Crown to supersede all law by his own authority should not be concerned in it, but should be absolutely free from all responsibility as regards the proclamation itself.

When Martial Law is proclaimed under special legislative sanction, the proclamation must be in exact accordance with the terms of the Act permitting it; where it is proclaimed under authority of statute law, as has been the case in Jamaica and elsewhere, the proclamation must be in exact accordance with the terms of such statute. Where Martial Law has been proclaimed under the prerogative of the Crown, the conditions of its exercise laid down in the proclamation must be such as is justified by the necessities of the case, and no time should be lost in obtaining the legislative sanction, wherever a legislature exists.

INSTRUCTIONS TO OFFICERS ADMINISTERING MARTIAL LAW.

107 *Need of Instructions.*—When Martial Law is proclaimed, the Authority proclaiming it should issue instructions to the military officer charged with its administration, and that officer should himself issue instructions for the guidance of his subordinate officers. In his charge on the trial of Governor Eyre, Mr. Justice Blackburne observed with regard to the administration of Martial Law :—

"The Duke of Wellington has said, that the person in command ought to take very great care to see it is properly regulated and controlled, and give proper directions for it. I do not think that any one can doubt that is very desirable, and I do not think in this you will have the slightest doubt, that owing to neglecting that, and letting persons run riot in the exercise of Martial Law, without having taken the proper care to see it rightly regulated, a vast number of things were done that ought not to have been done."

The following is the general purport of the instructions sent by the Colonial Office for the guidance of Governors of Colonies in the case of insurrection :—

"No place should be proclaimed in a state of insurrection unless there be armed resistance to law beyond the ordinary powers of suppression.

"Then such proclaimed district should not extend further than is necessary for public safety.

"Such proclamation should be published by all possible means throughout the district.

"*As far as possible, the Governor should give instructions to the officer commanding the military.*

"Civil magistrates should be warned that the proclamation gives them no extraordinary powers.

"Commanding officer to take the entire military authority.

"All officers to report as often as possible to him, and he to the Governor.

"Troops never without urgent necessity to be detached, except in command of a commissioned officer.

"All injury to non-combatants, women, and children, as far as possible to be avoided, and destruction to property.

"The Provost-marshal, when appointed, to be limited by written order as to punishments.

"No punishment, unless trial impossible, without court-martial of at least three officers, and every reasonable facility for defence, and no sentence of death except by two-thirds of the court.

"Written records to be left." (*Finlason, Com.* p. 286.)

EXTENT OF JURISDICTION—OVER ORDINARY LAW.

108 "Martial Law overrides, in respect to the persons upon whom it is to operate, all other law." (*Sir D. Dundas' evidence in Ceylon Committee.*)

1. The law officers of the Crown, when reporting on Martial Law in Lower Canada, in 1838, wrote:—"The question how far Martial Law, when in force, supersedes the ordinary tribunals, can never, in our view of the case, arise." "It cannot be said, in strictness, to supersede the ordinary tribunals, inasmuch as it only exists by reason of those tribunals having been already practically superseded." (*Clode, M. F.*, ii. 500.)

JURISDICTION AS TO PLACE.

109 Martial Law must be limited as to the extent of country to which it is applied. Offences committed out of the district proclaimed cannot rightly be tried by the courts constituted under Martial Law.

1. "When the Common Law can be exercised in some parts of the country, Martial Law cannot be established in others, without an extraordinary interposition of the supreme legislative authority itself." (*Sir James Mackintosh in Demerara Debate. Clode, M. F.*, ii. 487.)

2. As crime is local, care should be taken that the offender be arrested and tried, and the offence shall have been committed, within the area where Martial Law prevails. (*Clode, M. and M. L.*, 167.)
3. Courts-martial under Martial Law are restricted to the trial of offences constituted by acts done or taking effect within the district declared. As the trial of crimes is local, and depends on the locality of the offence, it follows that a person cannot be tried under Martial Law for an offence committed out of the district. (*Finlason, Com.* p. 214.)

JURISDICTION AS TO OFFENCES.

110 Courts-martial, or Military Commissions under Martial Law, are upon general principles restricted to the trial of offences committed in causing or in carrying on, or aiding and abetting, the rebellion. (*Finlason, Com.* p. 214.)

The nature of the acts or offences to be tried under Martial Law, would probably be, and should be, laid down in the Act of the Legislature authorizing its declaration, or at all events in the proclamation itself. Failing such directions, Mr. Finlason recommends that the regulations laid down for use in Ireland and India should be adhered to.

1. Those laid down in the Act authorizing Martial Law in Ireland in 1833, were as follows:—"Any person liable to be prosecuted for any offence committed within the district against any law prohibiting unlawful risings or assemblies, or preventing outrage or riot, &c., shall be tried by court-martial." It was provided in the same Act, "that such courts should not try cases of seditious libel, nor cases of combination or conspiracy, unless accompanied with actual force." But such offences as possession of arms, making signals, &c., might be tried. (*Finlason, Com.* p. 133.)
2. The Indian regulations enacted that the Governor-General in Council, under Martial Law, "shall be empowered to direct the immediate trial by courts-martial of all persons

owing allegiance, and who shall be taken in arms in open hostilities to the British Government, or in the act of opposing by force of arms the authority of the same, or in the actual commission of any overt act of rebellion against the State, or in the act of openly aiding or abetting the enemies of the British Government." Mr. Sergeant Spankie, when Advocate-General of Bengal, wrote of these regulations :—" It never was intended that these tribunals (courts-martial) should try acts even of a criminal nature in which the prisoner was not taken, and unless the acts were open overt acts, and of the most material, palpable quality. It is important that the court-martial should be confined to cases of the most obvious and dangerous criminality." (*Finlason, Com.* p. 222.)

EXTENT OF JURISDICTION—AS TO TIME.

111 The exercise of Martial Law should cease with the occasion for proclaiming it, or whenever the civil courts can be resorted to.

The proclamation should lay down a limit as to time, and offences committed before the proclamation was issued, or after the expiration of the term named, cannot rightly be tried by courts constituted under Martial Law. (*Clode, M. F.*, ii. 162.) A proclamation of Martial Law cannot have a retrospective operation.

1. Sir James Mackintosh, in the Demerara case, argued that Martial Law should rule only while the laws are silenced by the noise of arms : " but no longer; every moment beyond is usurpation ; as soon as the law can act, every other mode of punishing supposed crimes is itself an enormous crime." (*Clode, M. F.*, ii. 486.)
2. In the same debate it was generally admitted by the legal speakers that it was not correct that a court-martial should be empowered or called on to try an offence which was committed before the institution of Martial Law. (*Clode, M. F.*, ii. 489.)

3. The proclamation of Martial Law at the Cape in 1835, declared that Martial Law "shall continue to be in force until the expulsion of the said invaders, unless proclamation to that effect shall be previously made." (*Clode, M. F.*, ii. 503.)

EXTENT OF JURISDICTION—AS TO PERSONS.

112 The persons over whom Martial Law is to have jurisdiction should be clearly laid down by the Legislature or Executive Authority declaring it.

As regards Martial Law exercised under the prerogative of the Crown, its jurisdiction only extends over persons actually engaged in resisting the Government.

1. The law officers of the Crown, in 1838, stated in their report as their opinion, "that the prerogative does not extend beyond the case of persons taken in open resistance, and with whom, by reason of the suspension of the ordinary tribunals, it is impossible to deal according to the regular course of justice." (*Clode, M. F.*, ii. 500.)

113 An alien enemy, who comes into the kingdom hostilely to invade it, is liable to be tried by Martial Law as an enemy, and not by the common law courts as a traitor.

1. This was laid down by Lord Hale, and appears to have been acted upon by William III., one "Tobias le Roy, lately come out of France, having been so tried by court-martial in 1695." (*Clode, M. and M. L.*, 92.)

114 There is no necessary difference in the treatment of soldiers and civilians offending under Martial Law.

1. This was stated by Sir D. Dundas, then Judge-Advocate-General, in his evidence before the Ceylon Commission.

THE PROPER AUTHORITY TO ADMINISTER MARTIAL LAW.

115 The declaration of Martial Law is the act of the Government or other supreme authority. Its execution is directed by the Commander of the Forces. Its direction is intrusted to the General Commanding the Forces in the field. Its actual execution to different officers commanding detachments, the men under whom have simply to obey orders. (*Finlason, Treatise*, p. 73.)

When foreign invasion or civil war render it impossible for the courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them, and to employ for that purpose the military, which is the only remaining force in the community.

1. "The measures taken being necessarily military, whether in the field or in the disposal of prisoners by trial by court-martial, the particular direction of the measures must necessarily rest with the military commanders." (*Finlason, Com.* p. 191.)
2. While the laws are silenced by the noise of arms the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society. (*Sir James Mackintosh in Demerara Debate.*)
3. All that the Government can do is to communicate to the Commander-in-Chief general directions, leaving it to him to carry them out by issuing proper orders to the officers, and by seeing that their orders are observed and obeyed. (*Finlason, Com.* p. 213.)
4. In 1837, when Martial Law was proclaimed in Lower Canada by Lord Gosford, the Governor-General, orders were issued to Lieutenant-General Sir John Colborne, commanding the forces, to arrest and punish all persons acting, aiding in, or assisting the rebellion, according to Martial Law, either by death or otherwise, as should seem right and expedient to him and the other officers of Her

Majesty's Forces. At the same time the General was instructed to exercise his unlimited powers as far as possible in co-operation with or in subordination to the ordinary laws of the land.

Sir John Colborne notified that he would on every occasion avail himself of the assistance and advice of the civil authorities. (*Clode, M. F.*, ii. 498.)

116 Although the administration of Martial Law is necessarily intrusted to the military commander, it is no less the duty of the civil authority proclaiming it to watch over its execution.

This was laid down by Mr. Cardwell with reference to the Jamaica case, in his final despatch, thus :—

1. "Her Majesty's Government feel strongly that when a Governor has been compelled to proclaim Martial Law, it is his bounden duty to restrain within the narrowest limits the severities incident to that law, and for that purpose to keep himself constantly informed of what is taking place under it." "It was the duty of the Governor to inform himself of the character of the proceedings taken, and to put an end to all proceedings which were not absolutely necessary, and therefore justifiable on the ground of necessity."

SUBORDINATE MILITARY COMMANDERS.

117 A good general guide for the officers required to carry Martial Law into execution under military command, may be found in the *Instructions* issued by the Admiralty, under the advice of counsel, "to the commanding officer of a party landed where Martial Law prevails," which are as follows :—

"**9.** If Martial Law should be proclaimed in any district, you are to follow the directions of the officer appointed to the military command of the district.

"**10.** The arbitrary will of such officer in such case supersedes the ordinary law for the time being, in the same manner and degree as it would if the district placed under Martial Law was an enemy's country.

"**11.** You are to require directions in writing from the officer in military command of the district under Martial Law as to your conduct in all matters of importance, especially in regard to the treatment of prisoners taken by you, whether they be taken in the actual commission of violence against the persons or property of Her Majesty's subjects, or under other circumstances.

"**12.** It is competent for the officer in military command of the district under Martial Law to order prisoners to be brought to trial in a summary manner before a council to be named as he may direct.

"**13.** If you are to preside over any such council, usually termed a court-martial, although not necessarily constituted under the provisions of the Mutiny Act, you are to request instructions in writing from the officer in military command of the district, and you are not to carry into execution any sentence of such council, whether of death or otherwise, without being empowered so to do in writing by such officer.

"**14.** You will take minutes in writing, if employed on any such council, and you will require such of your officers as may be so employed to take minutes in writing of all the proceedings and evidence, to be communicated to your Commander-in-Chief for his information.

"**15.** You will take care, if so employed, and you will direct your officers, when so employed, to apply for the assistance, if possible, of a legal adviser.

"**16.** In case it shall not be practicable to obtain directions in writing from the officer in military command of the district, you will endeavour to obtain directions in such mode as will admit of no subsequent doubt as to their tenor, and shall commit them as soon as possible, if practicable, to writing.

"**17.** Under no circumstances are houses or property to be destroyed, except under the exigencies of military operations or of self-defence or under an order from the officer in military command of the district under Martial Law.

"18. The officer in command of a party is to keep a journal detailing all his proceedings, a copy of which is to be provided for the information of the Commander-in-Chief.

"19. In conclusion, you will observe that these instructions are framed for your guidance, in the absence of specific directions from the officer in the military command of the district, and you are in all matters relating to operations on shore to follow his directions.

"20. If any directions given by the said military officer should conflict with any of these instructions, you are nevertheless to act in accordance with his directions, first bringing to his notice, if possible, these instructions. You are carefully to weigh the comparative importance of any conflicting instructions you may receive, remembering that you will still be responsible to your naval superior for the execution of any orders you may receive from him." (*Finlason, Com.* p. 285.)

NATURE OF RULE UNDER MARTIAL LAW.

118 The nature of the rule under Martial Law may be directed by the Legislative or Executive Authority proclaiming it; where not so laid down, its nature within the proclaimed districts would be at the absolute discretion of the military officer intrusted with its execution. Every practicable usage of law should be adhered to, especially as to time, place, and procedure.

1. As Sir Charles Napier aptly expressed it—"The union of legislative, judicial, and executive power in one person is the essence of Martial Law," or as the Duke of Wellington explained, "It is neither more nor less than the will of the General of the Army. He punishes, either with or without trial, for crimes either declared to be such or not so declared by any existing law, or by his own orders." (*Clode, M. and M. L.*, 162.)

119 Nevertheless, an officer engaged in executing Martial Law is bound to carry it out in the manner ordered by

the Executive Authority. (*Sir D. Dundas' evidence, Q.* 5533.)

In the absence of definite instructions, either by proclamation or otherwise, the military officer called on to execute Martial Law must depend entirely on his own sense of expediency as to the measures which are necessary for him to adopt in regard to the public safety. (*Clode, M. and M. L.*, 165.)

120 Rules should be distinctly laid down by the Supreme Authority declaring Martial Law for the officers who are intrusted with its execution. This was laid down as necessary by the Duke of Wellington, and it was stated with reference to the Jamaica case by Mr., now Lord, Cardwell, "that if Martial Law was allowed to continue, instructions ought to have been issued to the officers to whom the actual conduct of the operations was intrusted."

TREATMENT OF REBELS.

121 When suppressing actual rebellion or insurrection, rebels in arms will be treated as enemies, in which category they are in fact placed by the Army Act (*A.* 192, 20.) When such rebels are captured they may either be reserved for trial or summarily punished.

In the heat of actual rebellion it may not be possible to keep prisoners, either from want of men to guard them or other cause; in such case the procedure would probably be such as that laid down by the Commander-in-Chief of the island in the Jamaica case.

1. "One of two courses seems to me under Martial Law to be the rule for your conduct; if on careful investigation the captured persons are innocent—always giving them the benefit of a doubt—then release them; but if guilty

and taken red-handed, summary justice and execution of the sentence." (*Finlason, Com.* p. 40.)

122 It should be remembered, however, that in the words of Lord Cardwell as to the Jamaica case, "No time should be lost in checking, at the earliest possible moment, those measures of instant severity which only an overwhelming sense of public danger justifies." (*Finlason, Com.* p. 52.)

1. The Lord Chief Justice in his summing up on the Jamaica case said:—"A rebel in arms stands in the position of a public enemy, and therefore you may kill him in battle, or you may refuse him quarter, dealing with him in this respect as with a public enemy." (*Finlason, Com.* p. 64.)

THE COURTS TO ADMINISTER MARTIAL LAW.

123 The nature of court, unless laid down by the authority proclaiming Martial Law, or by the Legislature in sanctioning its use, depends upon the Commander-in-Chief or military officer to whom the execution of Martial Law is intrusted. He becomes a dictator, exercising upon his own responsibility absolute power, trying criminals by whatever sort of tribunal he thinks fit. This was distinctly stated as the opinion of the Attorney-General in the Cape case in 1850. (*Clode, M. F.*, ii. 507.)

1. In the case of Ceylon, when Martial Law was proclaimed in 1848, the civil courts sat in districts beyond or out of the operation of Martial Law, and courts-martial sat in the district within its operation. In the case of the civil courts, the offences were committed before, and in those by the courts-martial the offences were committed after the proclamation. High treason and minor offences against the ordinary colonial law were among those dealt with by courts-martial. (*Clode, M. F.*, ii. 501.)

2. It does not appear that any court is absolutely necessary. "It is distinctly laid down that persons under Martial Law, *i.e.* in case of mutiny or rebellion, may be summarily tried and convicted, without even the ordinary forms of Military Law, and with only such inquiry, whether by court-martial or otherwise, as the circumstances admit of, and if by court-martial, then by such evidence as can be obtained." (*Finlason, Treatise*, p. 83.)

124 Courts-martial, by which Martial Law is administered, are not, properly speaking, courts-martial, or courts at all, and are mere committees, formed for the purpose of carrying into execution that discretionary power assumed by the Government. (*Legal opinion in Jamaica Case; Finlason, Treatise*, p. 254.)

The courts used to administer Martial Law are in the United States called "Military Commissions," to distinguish them from the ordinary military courts or courts-martial. It would be very desirable to adopt this nomenclature.

1. "The general tenor of the Governor's directions will doubtless be to restrict trial by court-martial to the graver and clearer cases of criminality, as murder, arson, and the like." (*Finlason, Com.* p. 213.)
2. Lord Beaconsfield, then Mr. D'Israeli, in 1866, when Chancellor of the Exchequer, when answering a question concerning Martial Law in Jamaica said:—"In the state of Martial Law there can be no irregularity in the composition of the court, as the best court that can be got must be assembled."

COMPOSITION OF COURTS.

125 The courts must be composed as directed by the Legislative or Executive Authority proclaiming Martial Law; where nothing is directed, their composition may be whatever the military officer in command may think best under the

circumstances. "The commanding officer will be careful to compose these courts of men (civil or military) whose experience and character afford to the criminal the best security for the exercise of a sound judgment and discretion." "The court should be formed as near to the model of the highest criminal court as possible." (*Clode, M. and M. L.*, 167.)

1. In the Irish Act of 25th March, 1799, the courts-martial to administer Martial Law and try "all persons engaged in the rebellion, or suspected thereof," were described as follows :—"Courts-martial, to be assembled under such authority, and to be constituted in such manner, and of such description of persons, as the said Lord-Lieutenant should direct." (*Clode, M. F.*, ii. 172.)
2. In the Act of the United Kingdom declaring Martial Law in Ireland in 1803, it was declared, "that the courts-martial should be constituted of commissioned officers, not less in number than seven nor more than thirteen, and that no sentence of death should be given unless two-thirds of those present concurred." (*Clode, M. F.*, ii. 173.)
3. Sir David Dundas, in giving his evidence before the Ceylon Commission in 1824, gave it as his opinion that "all good citizens," whether civil or military, "could be called upon to preside over or form part of tribunals administering Martial Law." (*Clode, M. F.*, ii. 173.)
4. In the case of the trial of Mr. Gordon in Jamaica in 1865, the court-martial consisted of a Lieutenant of the Royal Navy as President, and another, together with an Ensign of a West India Regiment, as members. (*Clode, M. F.*, ii. 493.)

PROCEDURE.

126 The mode of procedure may be any that is directed by the authority proclaiming or executing Martial Law ; where no directions are given, it will be better to follow as closely as possible the procedure laid down for courts-martial. The

court should proceed upon charges based on the known criminal law, and upon sworn evidence given in the presence of the accused. What he has to say in his defence should be patiently heard, and a record, complete as far as circumstances will permit, should be made of all the proceedings." (*Clode, M. and M. L.*, 167.)

1. "The court is bound by no rule of procedure, yet an officer would do well to follow the oath and the analogy which proceedings under the Mutiny Act suggest." (*Clode, M. F.*, ii. 162.)
2. Sir D. Dundas, the Judge-Advocate-General, when giving evidence before the Ceylon Committee, stated that he knew of no rule to which the proceedings of courts-martial under Martial Law are subject except that of common sense and humanity. He further gave it as his opinion, "that an officer cannot go very wrong who adheres, as closely as the circumstances will permit him, to the mode of administering the law under the Mutiny Act; and if he will take the latter part of the oath taken under the Mutiny Act, it appears to me to afford him a very safe and honest guide in such a critical case." The part of the oath referred to runs:—"If any doubt shall arise which is not explained by the said Articles or Act, then *according to my conscience, the best of my understanding, and the custom of war in like cases.*"
3. There must be a fair hearing, and a reasonable opportunity for answer and defence; if these substantial rules are observed, the non-observance of the more formal or technical rules of procedure, which cannot be applicable to such exceptional tribunals with such an irregular procedure, can work no substantial injury or injustice to the accused. (*Finlason, Com.* p. 237.)
4. "All that is necessary in case of actual mutiny, or even the imminent peril of it, if really formidable, is, that there shall be the observance of those rules of common justice and humanity which are universally obligatory, which are independent of all positive laws or forms, and the wilful non-observance of which indicates a bad motive, not an

honest intention to do what is right and really necessary. And a similar principle applies to the case of rebellion." (*Finlason, Treatise,* p. 84.)

5. Again, in *Bishop's Criminal Law,* it is said :—"Nothing is plainer in principle than that neither Military nor Martial Law is justified in running riot. The doctrines of right should in no emergency be violated, because no emergency can call for the commission of wrong. Emergencies may demand new methods and prompt movements in executing the right, but never the subversion of right and the execution of wrong."

127 *Charge.*—When a military commander has determined that there is evidence to sustain a charge against a prisoner within his cognizance, it is for him to frame the charge in accordance, as far as possible, with the analogies of military law in like cases. The charge, in order to justify a capital sentence, must be one either of treason, or of complicity in the crime of murder. The charge should be specific, and to justify a capital sentence, must be for an offence cognizable and capitally punishable under Martial Law.

128 *Evidence.*—The broad rules of Common Law and Military Law require that there should be sufficient evidence ; and, especially where the sentences are capital, there should at all events be an adequate amount of evidence in support of the charge, and a most careful consideration of its effect. There is one plain substantial rule which can never be disregarded without a grave degree of culpability, viz. that men must not be convicted upon the strength of evidence taken behind their backs. (*Finlason, Com.* p. 240.) One of the points most gravely censured in the Jamaica case of 1865, was that "in some cases, in which death was the sentence, the affidavits constituted the only evidence."

1. There ought to be legal evidence, and enough of it ; the evidence ought to be such as may reasonably satisfy honest

and sensible men, sincerely desirous to decide justly, and in a fair and dispassionate state of mind. The prosecution must make out their case against the prisoner, and though evidence may be circumstantial, and need not be conclusive, in the sense of excluding all possible doubt, it must be such as to exclude all reasonable doubt.

2. The instructions in Jamaica in 1865 seem to have been as follows :—" If any of the prisoners sent in were taken in arms or with stolen property in their possession, the parties who captured them should appear before the courts to give evidence against them. It is only the captors who can declare the grounds upon which the captures were made." (*Finlason, Com.* p. 213.)

EXECUTION OF SENTENCE.

129 The sentences of courts-martial administering Martial Law can only be carried out within the limits of space and time in which Martial Law has been proclaimed.

1. Thus, the Attorney-General in the Cape case of 1850, stated that if the convicts sentenced by the courts-martial " cannot be detained in the districts where Martial Law now exists, and where it will hereafter continue to exist, some difficulty will arise." " Questions of much delicacy might arise were such persons to apply to the Supreme Court in Cape Town for their liberation, or to kill or be killed in attempting to escape." " Legislation would be necessary in order to legalize effectually the imprisonment of all non-military persons sentenced by courts-martial or the Commander-in-Chief during the existence of Martial Law, and kept in confinement where Martial Law does not exist." (*Clode, M. F.*, ii. 508.)

130 The proceedings should be laid before the local Commander-in-Chief for revision and review, unless there is such imminent and urgent necessity for instant execution of the sentence as precludes that course.

1. Mr. Finlason says :—" Beyond all doubt, considering on the one hand the analogies offered by Military Law, and on

the other hand the extreme importance of having a clear, calm, and cool review of capital convictions by a superior commander, standing aloof from the heat, the haste, and the excitement of the district in rebellion, it is most desirable that there should be such review."

2. In the Jamaica case of 1865, the proceedings of the trial of Mr. Gordon were confirmed by Colonel Nelson, the officer in command of the district under Martial Law; sent by him to General O'Connor, commanding the district; and by the latter to the Governor, Mr. Eyre, as Commander-in-Chief.

NATURE OF PUNISHMENT.

131 It is inevitable that in cases of rebellion the punishment of death should be given in almost all cases of rebels taken red-handed, where the courts are sitting in the field, and rebellion is rife around them.

1. As was said in the directions given in Jamaica in 1865:—"It is not desirable with our over-crowded gaols to sentence prisoners to imprisonment, nor would I advise that flogging should be resorted to more than can be helped." (*Finlason, Com.* p. 213.) See also section 121.

NECESSITY FOR AN ACT OF INDEMNITY.

132 Although it may not be absolutely necessary that an Act of Indemnity should be passed in cases where Martial Law has been justifiably proclaimed and exercised, still it is very desirable that such an Act should invariably be passed for the protection of all persons engaged in its execution.

1. Lord Thurlow, Lord Chancellor, in speaking in the House of Lords as to the suppression of the riots of 1780 by the military, said:—"No doubt measures were taken for the suppression of the riot beyond what the ordinary rule of law would be found to justify; some things which under a cool, legal investigation would appear to be contrary to law, and punishable either by the common or statute law of the

realm; for undoubtedly, in opposing, repressing, and quelling such daring outrages as had been perpetrated, the military, as well as individuals, must necessarily have been forced into excesses; but when the occasion was duly considered, and the extreme hurry and violent confusion in which all men who joined in restoring the public peace were obliged to act, those excesses would be seen to be unavoidable, and to be the proper objects of an Act of Indemnity, but not an Act more necessary for the military than for other persons who had done as the military had done, and been instrumental in effecting that good purpose which the military had effected." (*Clode, M. F.*, ii. 167.)

2. Sir D. Dundas, in his evidence before the Ceylon Committee, stated:—"An Act of Indemnity is, of course, a prudent measure at all times. Whenever you overstep the law, I recommend you to obtain an Act of Indemnity, if you can, at once; but I am not sure that an Act of Indemnity is necessary. I think it would be wise for a Governor who has proclaimed and executed Martial Law to have the sanction of his Sovereign for his act, and it would be prudent for all persons who have acted under such a law to have an Act of Indemnity. It is a short answer to any person who asks you questions about your conduct during the time Martial Law existed." (*Clode, M. F.*, ii. 179.)

133 In the despatch of the Government of the 18th June, 1866, relative to the Jamaica case, it was given as the opinion of the law officers that "as regards all acts done by or under military authority, the proclamation of Martial Law under the law of the island operated within the proclaimed district to give as complete an indemnity as the Indemnity Act itself." Mr. Justice Blackburne, however, expressed a doubt whether the Local Act passed in Jamaica would bar trial in England for an act otherwise triable in England. (*Clode, M. F.*, ii. 497.)

1. In the Cape case in 1850 the Attorney-General gave it as his opinion that he deemed "an Act of Indemnity essential

in regard to every act against person or property, *primâ facie* actionable, of which the only justification capable of being pleaded in a civil court rests upon the Governor's proclamation proclaiming Martial Law, and upon the authority of the Commander-in-Chief acting under that proclamation." (*Clode, M. F.*, ii. 508.)

THE EFFECT OF AN ACT OF INDEMNITY.

COLONIAL GOVERNORS.

134 The Court of Parliament, or Queen's Bench, in England being the only tribunals for the trial of a Colonial Governor, a local Indemnity Act which has no force in England is useless to him. The indemnity of the Governor will practically depend on the approval or disapproval of the Ministers responsible to Parliament and the Crown.

1. Mr. Finlason says as to this:—"If there be a Local Act or Ordinance, the Governor, even though it confers legality, will have to justify to the Crown the propriety of his conduct in carrying it out; and, on the other hand, if there be no such Act, then, whether or not the law confers legality, the Governor, while equally having to justify his conduct to the Crown, will, if he has really acted under an honest and reasonable belief of necessity, be protected by a Bill of Indemnity. It is manifest, therefore, that the question resolves itself into one of approval or disapproval, by the Crown, of the measures taken for the suppression of a rebellion."

135 The opinion of the law officers in the Jamaica case was, that the effect of the Indemnity Act was to cover only such acts, as in the case of the Governor he may have reasonably and in good faith considered to be proper for the purpose of putting an end to the insurrection, or such as, in the case of subordinates, have been done under, and in conformity with, the orders of superior authority; or, if done without such orders, have been done in good faith and under

a belief, reasonably entertained, that they were proper for the suppression of the insurrection, and for the preservation of the public peace of the island. (*Clode, M. F.*, ii. 497.)

1. Lord Glenelg, as Colonial Secretary, instructed the Governor of the Cape in 1855 that the Indemnity should be worded for "all acts necessarily or properly done," so as not to cover acts of wanton and unnecessary vigour, or of injustice or cruelty, even when done *bonâ fide* to suppress, in furtherance of the objects for which Martial Law was proclaimed. (*Clode, M. F.*, ii. 504.) The same wording was directed to be used by the Duke of Newcastle, as Secretary of State, for the Indemnity Act in the St. Vincent case in 1862. (*Clode, M. F.*, ii. 510.)

136 It may be said generally that in all cases where Martial Law is put in force by authority other than Act of Parliament, the persons proclaiming it and acting under it may be called upon to justify themselves for violation of common law before the civil tribunals of the country, and the onus of proving the necessity lies upon them.

RESPONSIBILITY OF GOVERNOR OF COLONY.

137 The Governor of a colony is responsible for his acts in that capacity to the King, to Parliament, and in certain cases to the Court of King's Bench at Westminster, but not to the colonial tribunals.

1. This has been laid down frequently by authority, among other cases in the despatch of Lord Glenelg, Colonial Secretary, to Sir B. D'Urban, with reference to Martial Law at the Cape in 1835. (*Clode, M. F.*, ii. 502.)

138 Assuming a state of Martial Law lawfully established, the Governor cannot be liable for acts done under it, unless done by his direct personal authority. (*Finlason, Treatise*, p. 74.) Again, "A Governor or Commander, even

putting Martial Law illegally in force, is liable for such acts under it as would be in accordance with military usage in like cases, but not for any exceptional and criminal application of it by wanton and wilful cruelty on the part of those who actually and personally put it in force, for which they, not he, must answer. In short, he is liable for his own acts (if illegal): not for theirs."

1. In Mr. Cardwell's despatches as Secretary of State, in the Jamaica case, it was laid down that the Governor of a colony will be held primarily responsible for the declaration of Martial Law, and will be bound to keep himself fully informed of the manner in which it is executed. It is the duty of the General in command of the forces engaged in the suppression of rebellion, to give directions to the officers as to the mode in which they are to act. (*Finlason, Com.* p. 53.)

139 In estimating the responsibility of a Governor in declaring Martial Law, regard will be had to the difficulties of his position. Finlason says, *Com.* p. 173:—"The greatest judge and the greatest statesmen have equally laid down, that the conduct of Governors or others in authority in distant colonies or dependencies, acting not as private individuals, of their own mere motion, but in the discharge of great public duties, and the exercise of the greatest of all public trusts, that of government; are to be protected rather than prosecuted, if, acting honestly in the discharge of that duty, not with wilful illegality, but acting in the belief that they are acting according to law, or under a necessity which might fairly be considered to over-ride all ordinary law, they inflict injuries on individuals."

1. Thus, in Governor Wall's case, Chief Baron Macdonald said:—"When a well-intentioned officer is at a great distance from his native country, having charge of a member

of that country, and it shall so happen that circumstances may arise which may alarm and disturb the strongest mind, it were not proper that strictness and rigour in forms and matters of that sort should be required, where you find a real, true, and genuine intention of acting for the best for the sake of the public."

RESPONSIBILITY OF THE MILITARY.

140 When the military have acted under direct orders of the Executive, not in aid of the civil power, or under legislative sanction, they would appear to be responsible for their acts, which require subsequent indemnity by legislative enactment.

1. Lord Thurlow (Lord Chancellor), in speaking as to the suppression of the Gordon Riots, in 1780, by the independent action of the military, acting by the authority of the King, said:—"The military employed for that purpose were every one of them amenable to the law, because no word of command from their particular officer, no direction from the War Office, or order of Council, could warrant or sanction their acting illegally." (*Clode, M. F.*, ii. 166.)

141 Nevertheless, in such case, their conduct is, to a certain extent, covered by the Executive Authority under whose orders they have acted.

1. The distinction between the responsibility of an administrative officer, giving commands as Governor, and an executive military officer merely obeying them, was shown in the Jamaica case. In this, the successive Ministries of Earls Russell and Derby, although they did not interfere upon the trial of Governor Eyre by defending him through the agency of the Home Treasury, gave him access to all official documents needed for his defence, and a promise of pecuniary indemnity in the event of his defence being successful. But as regards the executive military officer,

Colonel Nelson, who had been engaged in carrying out Martial Law, Lord Derby's Government ordered his defence, from the commencement, to be taken charge of by the War Department. (*Clode, M. F.*, ii. 177.)

142 For any irregularity in their conduct, or violence, which is not a necessary consequence of carrying out their orders, the military are, without doubt, responsible.

1. Thus, Mr. Justice Blackburne, in the Jamaica case, laid down that the Governor was not to be deemed liable for the conduct of the military; their want of discipline was attributable to their commanding officers, and not to the civil officer. (*Clode, M. F.*, ii. 496.)
2. Mr. Finlason says:—"The execution of Martial Law, and the measures to be taken, especially the trials by courts-martial, being necessarily, from their nature, matters for military regulation, it is the military commanders who are primarily responsible."

IN CASE OF INVASION BY A FOREIGN ENEMY.

143 In the case of the invasion of any portion of the Queen's dominions by a foreign enemy, the ordinary law would cease to be possible, and Martial Law would prevail, which might be declared by the Legislature, by the Executive Government, or in extreme cases by the officer in military command on his own responsibility.

The nature of the Martial Law exercised in such case would be analogous to that prevailing during the occupation of hostile territory, and would vary according to circumstance and place.

1. "Its most complete sway would be when the home army was face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion. To save the country is

paramount to all other considerations." (*American Instructions.*) See also chap. vii.

144 In anticipation of the landing of an enemy in Ireland, the Duke of Wellington wrote thus in December, 1807 :—"The next thing to do is to proclaim Martial Law all over the country: the object of this proclamation will be, not to subject the people to military licentiousness, but to oblige them to obey, and to make it criminal to disobey, the orders of the General or other superior officers commanding in the different districts."

1. The orders must be :—

1st. To prevent any man from leaving his house between sunset and sunrise without a pass, except Justices of the Peace and those attending them to enforce obedience to the orders of the General.

2nd. To oblige every man to post upon his door the list of the names, and the descriptions of the persons in his house.

3rd. To make this master responsible that those persons are in his house at night, unless lawfully absent.

4th. To prevent any number of persons beyond 10 assembling at any time in any place.

5th. To oblige all persons to give up their arms.

6th. To force the supply of provisions and transport for the service of the army.

7th. To prevent their being supplied to the enemy.

"The Commanders must be held responsible for the conduct of their troops, as well in the performance of this part of their duty as of all others." (*Duke of Wellington's Irish Desp.*, p. 209.)

CHAPTER V.

INSTANCES OF THE USE OF MARTIAL LAW WITHIN THE UNITED KINGDOM.

145 THERE is no prerogative of the Crown so ancient, so important, and so undoubted as that of preserving the peace of the realm. From the very earliest origin of our liberties it has been recognized that the discharge of this great duty justifies the Crown in levying war upon rebels, and all through our history, as long as it was necessary, this right was exercised in rebellion. In the earliest times it was used against turbulent barons, as when Henry III. in A.D. 1225, on a turbulent knight seizing his Judges and imprisoning them in his castle, at once levied a force, made war on him, and having captured his castle, hanged the whole garrison. (*Matthew of Westminster.*)

In the Middle Ages it was used during numerous insurrections of the serfs and villeins, as in that under Wat Tyler in the reign of Richard II., when many of the rebels were executed without due process or form of law. After the Jack Cade insurrection also, in the reign of Henry VI., some of the leaders were executed immediately afterwards without any legal process, those subsequently taken being tried by a special Civil Commission. Although contrary to the terms of the Great Charter, and beyond all doubt contrary to the common law, the exercise of this right in case of armed rebellion has never been declared illegal.

146 The chances of rebellion in Great Britain are happily very remote. It cannot be said, however, that this is the case in Ireland, while the circumstances of many of our colonies render the necessity of using Martial Law in the future, as in the past, by no means improbable. It must be remembered, moreover, putting rebellion aside, that should any portion of the United Kingdom be invaded by a foreign enemy, which God forefend, the need of Martial Law would instantly arise.

REBELLION OF 1715.

147 Upon the threat of invasion, followed by rebellion, in 1715, the first action of the Government was to issue a proclamation on the 25th July, authorizing all officers, civil and military, by force of arms if necessary, to suppress the rebellion.

The proclamation was as follows :—

1. "*By the King, a proclamation for suppressing rebellions and rebellious tumults.*

"A PROCLAMATION.

"GEORGE R.

"Whereas of late, some of the meanest of our people have, in divers parts of this kingdom, seduced and stirred up to riots and tumults to the disturbance of the public peace, and *the same are now carried into open rebellion, and a levying of war against us and our Royal authority* by the said rebels, having not only declared the end of their rising in arms to be a general purpose, and that against law, but even proceeded with an armed force in many and distant places, to pull down, burn, and destroy the houses of our good and peaceable subjects, and by their having declared for the Pretender, and actually resisted and engaged with force of arms such as by lawful authority were endeavouring to disperse them, and there is no room to doubt but these

traitorous proceedings are promoted and encouraged by Papists, Nonjurors, and other persons disaffected to our government in expectation of being supported from abroad: *We have, therefore, thought fit for the suppressing and putting a speedy end to the said rebellion, by and with the advice of our Privy Council, to issue this our Royal proclamation*, hereby declaring that all our officers, civil and military, are by the duty of their several office and commands, *obliged to use their utmost endeavours, by force of arms if necessary*, to suppress all such traitorous rebellions, and that in like manner all the subjects of this realm are bound by law to be aiding and assisting in the suppression of such rebellions, or may act against such rebels without the presence of such officer, if the presence of such officer cannot be had, or if such officer refuses or neglects to execute his duty; and that all our dutiful and loyal subjects may, without any express warrant or authority, act in defence of their houses, persons, or possessions, if attacked or assaulted by such rebels or riotous persons, and if any of the said rebels shall happen to be slain, either by the civil or military officers, or our troops, or other our loyal subjects acting as aforesaid in the defence of the laws of our Royal authority, and the preservation of the public peace, such killing is justifiable, and they who do it are indemnified by law. And we, therefore, strictly charge and command all our officers, as well civil as military, and all other our obedient and loyal subjects, that wheresoever they shall meet with the said rebels and traitors, so as aforesaid, in arms and open rebellion against us, they do endeavour without delay to suppress them with their utmost force, and *to treat them with that severity with which rebels and traitors found in actual war and rebellion against the Crown may be treated.*

"Given at our Court at St. James's, the 25th day of July, 1715, in the first year of our reign."

148 All the extraordinary Acts of the Crown were sanctioned by Parliament. Authority was first obtained by 1 Geo. I. § ii. c. 8 to suspend the *Habeas Corpus* Act, and

seize the horses of suspected persons; then authority was taken to try the rebels distributed for safe custody in the various prisons throughout the country in any county, including that where the offences had been committed. There was no attempt to bring prisoners before courts-martial who ought to be tried by the common law, save in the instance of the half-pay officers at Preston.

1. Certain officers on half-pay had joined the Pretender and been taken prisoners at Preston. Instructions were sent to General Carpenter, the officer commanding there, by Sir William Pulteney, Secretary for War, dated 16th November, 1715, as follows:—"And I am particularly commanded by His Majestie to tell you that you must likewise proceed to the tryal of any of the half-pay officers who were with the rebells which you find upon the list of half-pay, of which I send you an attested copy from my office; and that such officers be punished in the same manner as deserters from the standing forces." Four out of the five officers taken prisoner were consequently arraigned before a court-martial, and sentenced to be shot as deserters, a sentence which was carried out. The officer who escaped was shown to have resigned his commission before joining the Pretender, and he was therefore not brought to trial. The illegality of their trial by court-martial was subsequently acknowledged. (*Clode, M. F.*, viii. 100.) Officers on half-pay are now only subject to military law when employed on military service under an officer of regulars subject to military law. (*A.* 176-1.)

149 Upon the opening of Parliament in January 1716, the Speech from the Throne referred to the "brave and faithful discharge of duty by the army as having *disappointed* our enemies, and contributed to the safety of the nation." Each House mentioned the same fact as a matter of special congratulation.

150 After the rebellion had been suppressed, two Statutes

were passed, one for indemnity and the other for pardon. The Act of Indemnity (1 Geo. I. ii. c. 33) ran as follows :—

1. "As divers Lords-Lieutenant, Deputy-Lieutenants, Justices of the Peace, Mayors, Bailiffs of Corporations, Constables, and other officers and persons well affected to His Majesty and his Government, who in order to preserve our present happy establishment, and the peace of the kingdom, and to suppress and put an end to the said rebellion, had apprehended and put into custody and imprisoned several criminals, and several persons who they suspected might disturb the public peace and foment or promote riots, tumults, rebellions, or evil designs against the Government, and also had seized and used several horses, arms, and other things, and also pressed divers horses, carts, and carriages for the service of the public, and did, for the purposes assigned, enter into the houses and possessions of several persons, and did quarter and cause to be quartered divers soldiers and others in the houses of divers persons, and did divers acts which could not be justified by the strict forms of law, and yet were necessary, and so much for the service of the public that they ought to be justified by Act of Parliament, and the persons by whom they were transacted ought to be indemnified;" and then made void all actions, suits and prosecutions, for or by reason of the premises, or of any other matter or thing, advised, commanded, or appointed to be done in 1715, in order to suppress the rebellion; and every person sued might plead the general issue, and give the Act and the special matter in evidence.

151 The second Statute granted a general and free pardon for all offences committed prior to the 6th May, 1717, with certain exceptions and reservations set forth in the Act. (*Clode, M. F.*, xviii. 13-17.)

HISTORICAL SKETCH OF THE REBELLION OF 1715.

152 It was known before the death of Queen Anne that an attempt would be made by the adherents to the Stuart

dynasty to secure the succession to the throne to the Pretender, the brother of the Queen, instead of to the Elector of Hanover, whose succession had been provided for by Parliament. Looking to the distracted state of parties in England, to the storm of disaffection in Ireland, and remembering that the Hanoverian succession would be discountenanced by all the Catholic Powers from religion, and by many of the Protestant from policy, there was every reason to anticipate a period of violent struggles and a doubtful victory. Queen Anne became ill at the end of July, was seized with a fit on the 30th, and died on August 1st, 1714. Only a few days before this the Ministry had been changed—Harvey, Earl of Oxford, being succeeded by the Duke of Shrewsbury. On the 6th of August, 1714, George I. was proclaimed King, and on the 18th September landed at Greenwich.

1. In 1715 riots and outrages broke out in several parts of the country, especially Staffordshire, and the Riot Act was passed. Louis XIV. of France, the great friend of the Pretender, had died on the 1st September. On the 6th September Lord Mar raised the standard of the Chevalier at Kirkmichael, a village of Brae Mar, and by the 14th nearly the whole country north of the Tay was in the hands of the insurgents, while the Government had only a force of 8000 men at their disposal.
2. Parliament voted most loyal addresses, suspended the *Habeas Corpus* Act, granted liberal supplies, offered £100,000 for the Pretender alive or dead, and empowered the King to seize suspected persons. All half-pay officers were recalled to active service, and 21 regiments (7000 men) were ordered to be raised. On the 28th September Mar entered Perth at the head of 5000 men, but foolishly lingered there for weeks without taking action.
3. The Government acted energetically in seizing disaffected persons in England, and on the 6th October General Pepper, with a squadron of dragoons and an order from the Secretary of State, marched to Oxford, entered it at daybreak,

summoned the Vice-Chancellor and Mayor into his presence, and after threatening to fire upon any persons assembling in the streets above the number allowed by the Riot Act, seized ten or twelve suspected persons and left the town.

4. On the 6th October, Lord Derwentwater and Mr. Forster had risen in Northumberland. On the 12th October, Lord Kenmure proclaimed the Pretender at Moffat, and after failing to seize Dumfries, joined Mr. Forster's force on the 19th, and marched on Kelso.

5. Mar, after long indecision, sent General Gordon to seize Inverary, and Brigadier MacIntosh with 2000 picked men across the Frith of Forth, east of Edinburgh. The latter with 1600 men seized the citadel of Leith on the 14th October, but evacuated it on the advance of the Duke of Argyle, and on the 22nd joined the insurgents under Lord Kenmure and Mr. Forster at Kelso, the combined force being about 2000 men. After disputes and delay, some 1500 of these men under Mr. Forster marched into England, and on the 2nd November entered Penrith.

6. A general levy, or *Posse Comitatus*, of 10,000 men under the Bishop of Carlisle and Lord Lonsdale had been called out to oppose them, but fled at their approach, the rebels taking many horses and prisoners, the latter of which they released. The insurgents then continued their march through Appleby and Kendal to Kirby-Lonsdale, everywhere proclaiming the Pretender and levying money, and on the 9th November entered Preston, where they were joined by nearly all the Roman Catholic gentry of the district with their servants and tenants, to the number of about 1200. They were, however, a mere rabble, very imperfectly armed.

7. On the 12th November, General Carpenter from Scotland and General Wills from Manchester joined their forces to the number of 1000 before the town, and next day Mr. Forster, who appears to have been an utterly incapable leader, surrounded by chiefs divided among themselves, ignominiously surrendered.

8. Mar had left Perth on the 10th March to fight Argyle, and their forces met on the 13th November at Sheriffmuir;

the left wing of each force completely routed the enemy in front of it, and the result was indecisive.

9. The Pretender had been delayed by negotiations in France and England, and did not leave Lorraine until the 28th October. After a futile attempt to reach England from St. Malo, he sailed for Scotland from Dunkirk in the middle of December, and landed at Peterhead on the 22nd, attended by only six persons.

10. In the mean time Mar's force had almost melted away, and negotiations for surrender had been opened, but the English Government had now collected a sufficient force, including 6000 Dutch troops from Holland.

11. The Pretender was met by Mar and others, and on the 8th arrived at Scone, and issued proclamations, among others one ordering all men from 16 to 60 to repair to his standard. On the 30th January the Pretender's army retired from Perth to Dundee, followed by the English and Dutch troops under General Cadogan, one of Marlborough's best officers, who had been sent to give more life to Argyle's movements.

12. The insurgent army from Dundee continued its march to Montrose, and on the 4th February the Pretender left the army secretly at night, and embarked in a small French vessel for France, leaving General Gordon in command. The Highlanders, disgusted and disappointed, dispersed as they marched northwards, and the rebel force then gradually disappeared.

13. Of the prisoners taken at Preston, some half-pay officers, being treated as deserters, were tried by court-martial and forthwith shot. About 500 of the inferior prisoners were sent to Chester Castle, and others to Liverpool; those of gentle birth were escorted to London, arriving there on the 9th December. From Highgate each of them had his arms tied with a cord across his back, their horses being led by foot-soldiers, and the drum of their escort beating a triumphal march. Lord Derwentwater and Kenmure were beheaded, and some 26 were hanged.

REBELLION OF 1745.

153 When the rebellion of 1745 broke out, Parliament was in recess. On the 5th September the King, by the

advice of the Privy Council, issued a proclamation against Papists, and charged all civil magistrates to do their utmost to prevent and suppress all riots, and to put in execution all laws made for the preventing of the same.

The proclamation was as follows :—

"*By the King, &c. &c. &c.*

"GEORGE R.

1. "Whereas the eldest son of the Pretender hath presumed, in open violation of our laws, to land in the north-west part of Scotland, and has assembled a considerable number of traitorous and rebellious persons in arms, who have set up a standard in the name of the Pretender, and in an audacious manner have resisted and attacked some of our forces, and are now advancing farther in that part of our kingdom of Great Britain; and there is the greatest reason to apprehend that these wicked attempts have been encouraged, and may be supported, by a foreign force."

(Then the Statutes against Papists and reputed Papists were recited and put in force, and the proclamation ended thus) :—

"And we do hereby further strictly charge and command all our Judges and Justices of the Peace and other magistrates, that they do use their utmost endeavours to prevent and suppress all riots, tumults, and unlawful assemblies; and to put in due and strict execution all laws made for preventing, or for the more speedy and effectual suppressing and punishing the same; and that all our loving subjects be aiding and assisting therein."

154 The action of Parliament was much the same as on the occasion of the former rebellion. Both Houses, on their reassembling in October, voted addresses pledging themselves to support the authority of the Crown.

Authority was obtained from Parliament for the suspension of the *Habeas Corpus* Act, for the speedy trial of offenders by the common law courts, and for indemnity, the same

terms being used as in the Act of George I., except that indemnity was added for those gaolers from whose custody prisoners had been discharged by the rebels.

SKETCH OF THE REBELLION OF 1745.

1. Owing to the hiring of Hanoverian and other foreign troops, the Government of King George II. was very unpopular. When the threat of the French invasion was made in 1744, only 7000 English troops were available for the defence of the capital. On the other hand, 15,000 veteran troops, under Marshal Saxe, were assembled at Dunkirk; a large number of transports were collected in the Channel; and 18 sail of the line were ready to sail from Rochefort and Brest. The French fleet and transports actually sailed, but the fleet retired before the English fleet, and a great storm destroyed many of the transports. An indecisive naval action with the French and Spanish occurred off Toulon, in February, 1744.
2. The Young Pretender sailed from the Loire on the 2nd July, 1745, and after narrowly escaping capture, landed on the West of Scotland on the 25th July; his standard being raised on the 19th August. The Government offered a reward of £30,000 for the Young Pretender.
3. Sir John Cope, having left Edinburgh with 1500 men, started from Stirling on the 20th August, marching on Fort Augustus. He avoided an action with the rebels, and marched on Inverness to join the loyal clans. Charles, advancing southwards, was joined by numerous clans; on the 30th August reached Blair, the seat of the Duke of Athol, and entered Perth on the 3rd September.
4. On the 11th September, the Pretender left Perth and marched on Edinburgh; the greater part of the train-bands in that city neglected the call to arms, and those who turned out, as well as the dragoons with them, fled when they met the rebel advanced guard. On the 17th September Charles entered the city. On the 20th the Pretender's forces, some 2500 strong, met Sir John Cope's regulars of about equal strength at Preston Pans. Sir John had his foot in the centre, with a regiment of dragoons and three guns manned

by seamen on each flank. The Highlanders carried the guns by a rush, on which the dragoons bolted. The Royal Infantry, attacked on all sides, stood firm for some time, but after a few minutes were entirely routed, with a loss in killed of 400 men, the insurgents losing only 30 killed and 70 wounded.

5. The English people were entirely passive. Fox wrote:—"England, Wade says, is for the first comer, and if you can tell whether the 6000 Dutch and the 10 battalions of English, or the 5000 French or Spaniards will be here first, you know our fate." Within six weeks of Preston Pans Charles' army numbered nearly 6000 men.
6. The Pretender on the 31st October left Edinburgh, and with 6000 men, of whom 500 were cavalry, marched southward, entering Cumberland on the 8th November. On the 17th, Carlisle town and castle with its garrison capitulated. On the 20th Charles left Carlisle in two divisions of some 4500 men, leaving 200 to garrison Carlisle. On the 27th they reached Preston, and Manchester was entered amidst rejoicing on the next day.
7. In the mean time Marshal Wade had begun to advance against them through Yorkshire. In front lay the Duke of Cumberland at Lichfield with 8000 men; a third army of the Guards and newly-raised troops being formed at Finchley, close to London. Admiral Vernon was cruising in the Channel, and Admiral Byng on the east coast of Scotland.
8. Leaving Manchester on the 1st December, Charles evaded the Duke of Cumberland's force, and reached Derby on the 4th. This advance caused a general panic in London, but the English population, indifferent to the result, remained passive, but very few joining the Pretender; and owing to the protests of his officers, Charles on the 6th December began his retreat to Scotland. The Highlanders, disgusted, relaxed their discipline, ravaged and plundered, and the inhabitants retaliated on their sick and wounded. On the 17th Charles entered Penrith, pursued by Cumberland's dragoons and some infantry mounted on horses. At Clifton Moor these men were defeated by the Highlanders, and the retreat was afterwards unmolested. On the 19th

Charles reached Carlisle, and on the 26th Glasgow, having marched 580 miles in 56 days.

9. By the 4th January 9000 men under Charles were assembled at Stirling. On the 18th the insurgents fought the Royal troops under General Hawley at Falkirk, and defeated them. (*Lord Mahon*, iii. 427—435.)

10. The Duke of Cumberland was now appointed to the command. He entered Edinburgh on the 31st January, and on the 1st February the insurgents, who had been besieging Stirling Castle, began their retreat to the Highlands, where they occupied Inverness and took Fort Augustus—Cumberland meanwhile occupying Perth and afterwards Aberdeen. On the 8th April he set out from Aberdeen, with 8000 foot and 900 cavalry, and on the 16th met Charles at Culloden at the head of barely 5000 men, all of whom had been nearly starved while cooped up in the Highlands.

11. The Duke of Cumberland formed his force in three lines, the cavalry on each wing, with two guns between every two regiments of the first line. "To obviate the effect of the Highland target, he had instructed his soldiers to direct their thrust not at the man directly opposite, but against the one who fronted his right-hand comrade." The insurgents were totally defeated, with a loss of 1000 killed and wounded, the Royal troops losing only 310 men. Quarter was seldom given, prisoners were shot next day in cold blood, and the population treated with brutal cruelty. The rebels dispersed by Charles' directions.

12. The Duke of Cumberland received the thanks of Parliament, and a pension of £25,000 a year. President Forbes, a venerable Judge and a staunch adherent of the King, pleaded for compassion, urging the authority of the laws. The Duke replied, "What laws? I will make a brigade give laws."

13. After wonderful escapes and adventures Charles managed to embark in a French ship on the 20th September from the western coast of scotland. The Scotch prisoners were removed for trial to England, and 80 were executed and quartered. Lords Cromarty, Kilmarnock, Balmerino, and Lord Lovat were beheaded. A few weeks afterwards an Act of Indemnity was passed, but with about 80 exceptions.

INSTANCES—IRELAND, 1798.

155 In 1798, a traitorous conspiracy for the subversion of all lawful authority having broken out in open rebellion, the Lord-Lieutenant, Lord Camden, issued an Order in Council on the 30th March, 1798, to the following effect :—

1. "Whereas a traitorous conspiracy, existing within this kingdom, for the subversion of the authority of His Majesty and the Parliament, and for the destruction of the established constitution and government, hath considerably extended itself, and hath broken out into acts of open violence and rebellion. We have, therefore, by and with the advice of His Majesty's Privy Council, issued the most direct and positive orders to the officers commanding His Majesty's Forces, to employ them with the utmost vigour and decision for the immediate suppression thereof, and also to recover the arms which have been traitorously forced from His Majesty's peaceable and loyal subjects, and to disarm the rebels, and all persons disaffected to H. M. Government, by the most summary and effectual measures." It goes on to charge all peaceable and loyal subjects to assist the troops.

156 Unfortunately, the rebellion considerably extended itself, and a second Order in Council was issued on the 24th May, 1798, to all general officers commanding H. M. forces, to punish all persons, acting, aiding, or in any manner assisting the rebellion, according to Martial Law, either by death or otherwise, as to them should seem expedient for the suppression and punishment of all rebels. Earl Camden, the Lord-Lieutenant, communicated these orders and proclamations by message to both Houses of the Irish Parliament, who expressed their entire approbation of the decisive measures taken, however deeply they lamented the necessity for them, and pledged their support to every measure which might be necessary for the speedy and effectual suppression of the rebellion.

1. While the second Order in Council was in operation Wolfe Tone's case arose. Having been captured at sea on board a French man-of-war, on the 16th November, 1798, he was brought before a court-martial sitting in Dublin barracks for trial, for traitorously entering into the service of the French Republic, then at open war with His Majesty, and bearing arms against his King and country. He was found guilty and sentenced to death. While so sentenced Mr. Curran made an application for a *habeas corpus* to the Queen's Bench, then sitting in Dublin, on the ground that as Mr. Tone was not subject to Military Law no court-martial could try him while the civil courts were open. He argued :—" I stand upon this sacred and immutable principle of the constitution—that Martial Law and Civil Law are incompatible, and that the former must cease with the existence of the latter." The court granted the application, but as Wolf Tone committed suicide on the 19th November, no ultimate decision was ever given in the case.

157 Application was made to the Irish Parliament for further powers, and an Act was passed on the 25th March, 1799, which after referring to His Majesty's " undoubted prerogative in executing Martial Law, for defeating and dispersing the armed and rebellious force," and declaring that although peace was partly restored the rebellion still continued to rage, " and has utterly set at defiance the civil power, and stopped the ordinary course of justice and of the common law therein," enacted that Martial Law should be put in force whether the ordinary courts of common or criminal law were or were not open.

1. " Rebels were to be punished according to Martial Law, either by death or otherwise," as might seem expedient to " all officers commanding His Majesty's Forces," and to all others whom the Lord-Lieutenant might authorize. " All persons arrested or detained were to be brought to trial in a summary manner, by courts-martial, to be assembled under such authority, and to be constituted in such manner, and of such description of persons as the said

Lord-Lieutenant should direct, for all offences committed in furtherance of the rebellion, whether such persons should have been taken in open arms against His Majesty, or should have been otherwise concerned in the rebellion, or in aiding, or in any manner assisting, the same, and to execute the sentences of all courts-martial, whether of death or otherwise."

2. Nothing done under the Act was "to be questioned in H. M. Court of King's Bench, or in any other Court of the Common Law." After the suppression of the rebellion an Act of Indemnity was passed, condoning all acts not justified by law done in order to suppress the rebellion.

SKETCH OF THE IRISH REBELLION OF 1798.

158 It is impossible to give here even a summary of the long series of causes which had produced the miserable state of affairs existing in Ireland at the accession of George III. in 1760. The King himself, on his accession, had endeavoured to reform the state of Ireland by removing some of the terrible corruptions that prevailed in the government of that country, but the hatreds of race and religion nurtured by centuries of feud had sunk too deeply into the national life and character to enable the well-intentioned endeavours of the Sovereign to have much effect.

1. In 1774, the American War of Independence began, brought on by the short-sighted endeavour to tax the colonies for the benefit of England without their consent. Many of the oppressed Protestants of Ireland had emigrated to New England, and the greatest sympathy with the American Cause existed among their co-religionists in Ireland.
2. In 1795, the organization of the Catholics was met by the organization of the Orange Society in the north of Ireland, whose object, as stated in their declaration, was to rally round the Constitution, to maintain the laws, and support the King against all his enemies, "whether rebels to their God or their country." Opposed to these were the "United Irishmen," who were secretly organizing an armed insurrection to be carried out with the aid of France,

with whom England was at war. The United Irishmen were not all Catholics, but were largely recruited among the Presbyterians, who strongly sympathized with the principles of the French Revolution. The great body of the Roman Catholic peasantry were with the insurgent cause, but the bishops, priests, and most of the Roman Catholic aristocracy kept aloof. It was estimated at the close of 1796, that 500,000 men had taken the test in every part of the country, and nearly 300,000 were reputed as armed either with firelocks or pikes. Lord Edward Fitzgerald, a son of the Duke of Leinster, was at the head of the movement.

3. Wolfe Tone, one of the leaders of the movement, went to France in 1796, and endeavoured to obtain aid from the Government, promising that if 20,000 men were landed in Ireland, they would be joined in a month by 300,000 men, if necessary. The French Directory declared they could not spare so many men, but ultimately decided to send an expedition under General Hoche, who appointed Wolfe Tone a Brigadier in the French army.

4. On the 16th December, 1796, a French fleet of 43 sail, including 17 sail-of-the-line, under Admiral Morand de Galles, sailed from Brest. Generals Hoche and Grouchy, and also Wolfe Tone, were on board, with 14,000 men, and arms, ammunition, and stores for 45,000 more, for distribution among the Irish on landing. The destination was the coast of Ireland, but the English Government had been deceived by a proclamation that it was intended for Portugal. The expedition met with heavy weather; in leaving Brest harbour one 74-gun ship, with nearly all her crew, was lost. On the first night the 'Fraternité' frigate, with the Admiral and General Hoche on board, was separated from the fleet and never rejoined it; and when the fleet arrived off Cape Clear, on the 21st of December, only 35 sail were in company. A heavy gale on the 22nd still further scattered them, and only 16 reached Bantry Bay. Arrangements were made to land with the troops available, but the gale continued with such force that the fleet were compelled to get under weigh, and finally the remnant returned to Brest on the 1st January, 1797.

5. As already mentioned, the English Government, deceived by Hoche's proclamation, imagined the destination of the French expedition to be Portugal, and consequently made no preparations to meet it in Ireland. The fleet blockading Brest had been driven off their station by the weather, but the British frigate 'Kangaroo,' cruising in the Channel, fell in with the French fleet, and landed an officer at Crookhaven, near Bantry Bay, to give the intelligence to the Admiral at Cork, from whence it was transmitted to Dublin. A local corps of yeomanry turned out, and being posted for observation along the coast, gave early information of the arrival of the enemy. The only other force at Bantry Bay at the time was 400 of the Galway Militia. The season was severe, the roads impeded with snow, and the march of troops consequently slow and difficult. All the detachments that could be mustered were immediately despatched to the South; the peasantry worked willingly in clearing the roads, and showed no signs of sympathy with the French; this feeling being, in fact, principally confined to the north of Ireland at that time.
6. As already described, the landing from the French ships was prevented by the weather; had they remained longer they would probably have been captured, as immediately after they had sailed, an English fleet, under Lord Bridport, entered Bantry Bay. It is evident, however, that if any large portion of the French force, which was composed of seasoned soldiers, had landed, matters would have assumed a very serious aspect, for there were not, at the time, 3000 regular troops in Ireland to oppose them, while naval stores to the value of a million and a half sterling were in Cork almost unprotected.
7. Owing to the disturbed state of the country, and the apprehension of invasion, the Bill for suspending the *Habeas Corpus* Act had been passed by the Irish Parliament, on the 15th October, 1796.
8. Throughout 1797, the organization of the "United Irishmen" was continued under an Executive Directory of five, composed of Arthur O'Connor, Lord Edward Fitzgerald, Oliver Bond, Dr. MacNevin, and Thomas Addis Emmett. The Association was most active in the counties

of Down, Derry, Antrim, and Donegal, where they threatened the lives of all who were thought likely to inform against them. They assembled in great numbers at night; disarmed the peaceable inhabitants; fired at the Justices of the Peace; collected great quantities of arms in concealed hiding-places; cut down great quantities of young trees for making pike-staves; and stole lead for making bullets. The pike-heads were soon made, for almost every blacksmith was an United Irishman.

9. Early in 1797 General Lake was put in command of the military force in Ulster, with orders to take measures for immediately disarming all persons not holding His Majesty's commission, or serving under persons so commissioned. He was also authorized to employ force against any persons who assembled illegally with arms, and to disperse all tumultuous assemblies, without waiting for the sanction or assistance of the civil authority, if he were of opinion that the peace of the realm, or the safety of His Majesty's faithful subjects, would be endangered by delay. He was also required to station his troops so as to interrupt communications between those whom he suspected of evil designs; to establish patrols on the high roads; and to stop all persons passing or repassing after certain hours of the night.

10. Soon after the receipt of these orders, on the 13th March, 1797, General Lake issued a proclamation, placing Ulster under Martial Law. Consequent on this, two committees of United Irishmen were arrested at Belfast, and their papers seized; these put the Government in possession of such details as left no doubt that a most dangerous secret conspiracy was at work to sever the connection between Great Britain and Ireland, and to establish the latter as an independent republic. These papers were referred to a Secret Committee of the Irish House of Commons to examine.

11. After the report of this Committee, on the 17th May, 1797, a proclamation was issued by the Lord Lieutenant in Council, warning all persons to abstain from entering into the traitorous societies of the United Irishmen; from suffering them to assemble in their houses; from harbouring

them, or resorting to their meetings. All persons having knowledge or information of the meetings of the said societies were to communicate the same to some of His Majesty's Justices of the Peace, or to some officer of His Majesty's forces in the neighbourhood. All persons having fire-arms, and who were not authorized to keep them, were to deliver them up to the authorities, and if they refused were to be seized.

12. On the 18th May, the Commander-in-Chief in Ireland, Lord Carhampton, was ordered to employ the military to give effect to this proclamation, and he immediately issued the necessary instructions to the officers under his command. In consequence of this order numerous arrests were made.

13. Meanwhile the Executive Directory of the United Irishmen were negotiating for foreign aid. One John Edward Lewins, their agent, and Wolfe Tone, were instructed to ask the French Government for a loan of £500,000, to be repaid out of the property of the Irish Church; for an auxiliary force of not less than 5000, nor more than 10,000 men, and arms and ammunition for 20,000 or 40,000. The number of men was limited to 10,000, as it was feared a larger force might establish French supremacy in Ireland, as had been done in Holland and Switzerland. Aid was also to be demanded from Holland and Spain, the latter being asked to contribute another half-million of money, and 30,000 stand of arms.

14. The result of this mission, seconded by General Hoche, was, that the Directory resolved that another expedition should be sent to Ireland; that it should be fitted out in Holland, the troops to be commanded by General Daëndels, Commander-in-Chief of the Batavian Republic, and the fleet by Admiral de Winter. The Batavian Republic was anxious to have the whole glory of this expedition, in order to restore the national character, as they considered Holland had been forgotten in Europe.

15. The ships, sixteen sail-of-the-line and eight or ten frigates, were collected in the Texel, and 15,000 men, all the national troops of the Batavian Republic, with 30,000 stand of arms, 80 pieces of artillery, money for their

pay, and subsistence for three months, were ultimately embarked. The expedition was ready to leave the Texel by the middle of July, when a head-wind set in and prevented the ships from sailing. The head-winds continued, the summer passed away, the expedition was given up, and the United Kingdom was, for a second time within a period of nine months, saved from invasion by the wind.

16. De Winter put to sea later on with his ships only, in obedience to the peremptory orders of his Government; and on the 11th October, 1797, was defeated by Admiral Duncan at Camperdown, south of the Texel, 15 of his vessels being either taken or sunk, and the naval power of the Batavian Republic completely destroyed. On the 18th September General Hoche had died.

17. While the Executive of the United Irishmen were endeavouring to bring a foreign force into the country, and actively organizing an insurrection to combine with it, the Irish Government were making preparations to meet the emergency. The disarming of the population was carried out. During the year 200,000 pikes and pike-heads were discovered or surrendered, with several thousand fire-arms. Fresh troops were applied for from England and received, and before the year closed the yeomanry and English and Scotch militia amounted to 35,000 men, while the regular troops were increased to 50,000, and subsequently to 80,000, including three regiments of the Guards. The defensive works at Dublin, Cork, and every accessible place along the coast, were also strengthened, and a general system of communication by signals established. In November, Lord Carhampton resigned his commission as Commander-in-Chief, and was succeeded by Sir Ralph Abercromby.

18. Early in 1798, the Executive of the United Irishmen began to put their schemes into execution. An extensive system of assassination of persons remarkable for their loyalty was carried into effect during the months of January and February. Negotiations were still going on with the French Government, and the peasantry were being trained and drilled throughout the night in all parts of the country.

19. The troops employed in suppressing these excesses, at

the suggestion of Lord Castlereagh, were permitted to live at "free quarters," that is, to make the people find lodging and provisions for them, in the districts where the insurrection raged, in the hope that the inhabitants would be overawed. The natural result was the demoralization of the troops and the destruction of all discipline, to such an extent that in a general order of the 26th February, 1798, Sir Ralph Abercromby stated that "the army was in a state of licentiousness, which must render it formidable to every one but the enemy." This order gave great offence, and in consequence Sir Ralph resigned his commission in April, and was succeeded by General Lake.

20. Whilst many parts of the country were thus oppressed by the military, in others, especially in the King's and Queen's counties, and the counties of Cork, Limerick, Tipperary, Kilkenny, Carlow, Kildare, and Wicklow, the armed peasantry committed such outrages and depredations by night, that the loyal inhabitants of the country districts left their houses and took refuge in the garrison towns.

21. In consequence of information given to the Government by spies and informers, it was ascertained that the United Irishmen were in league with conspirators in England, banded under the name of "United Britons," and a delegation of five persons from both societies who were proceeding to Paris to negotiate for French assistance, were arrested at Margate in February just as they were about to sail for France.

22. On the 12th March, four out of the five persons composing the Executive Directory of the United Irishmen were arrested in Dublin, with many secret papers on their persons disclosing their intentions. The fifth member, Lord Edward Fitzgerald, remained at large until the 19th May, when he also was arrested.

23. On the 13th March, 1798, a proclamation was issued stating that a traitorous conspiracy, for some time in agitation, had at last broken out in open rebellion, and declaring the country to be under Martial Law.

24. Information was given to the Government in April that the conspirators considered that they had gained over all the Irish militia, with the exception of a very few, and also

the Scotch, but could make nothing of the English. Also, that as soon as the French had assembled their forces and were ready, Ireland was to be invaded in three different places, viz. Belfast, the Shannon, and Londonderry. Early in May it was also ascertained that the conspirators had decided that Lord Edward Fitzgerald was to raise his standard in Leinster on the 23rd of May, which was to be the signal for a general rising throughout the island; that the insurgents in the counties of Dublin, Wicklow, and Kildare were to co-operate in an attack on Dublin; that the camp at Loughlinstown and a large park of artillery at Chapelizod were to be taken by surprise, the Lord-Lieutenant and the members of the Government being seized and held as hostages.

25. On the 19th of May Lord Edward Fitzgerald was arrested in Dublin, and on the morning of the 23rd May further arrests were made of leaders of the conspiracy. With them a draft of a proclamation was found calling on the people to rise, arm themselves, and fight for liberty; it was declared, "war alone must occupy every mind and every hand in Ireland until its long-oppressed soil is purged of all its enemies." "As for those degenerate wretches who turn their swords against their native country, let them find no quarter." Owing to these arrests and discoveries the insurgents were surprised and the attack on Dublin frustrated.

26. On the 24th May the city of Dublin was declared to be under Martial Law, and the Lord Mayor, Recorder, and Justices issued a proclamation warning the inhabitants that "the Act more effectually to suppress insurrections, and prevent the disturbance of the public peace" was in force, and they were required to "keep within their dwelling at all unseasonable times between sunset and sunrise." The courts of justice were from that time closed, except for civil actions, until the insurrection was suppressed. During this time the barristers pleaded in the courts in their uniforms and with their arms beside them, and the whole city is said to have borne the aspect of a huge barrack.

27. In the course of the day (May 24th) intelligence was

received that the rebellion had broken out in all the country round Dublin. The insurgents took possession of the town of Dunboyne, seven miles from Dublin, where all the Protestants were put to death, and their houses plundered. This was the course generally pursued by the conspirators, when successful, as difference of religion was the only badge of party they could understand, and it naturally caused the Protestants to retaliate subsequently with equally disgraceful excesses. Shocking deeds were committed in the counties of Meath and Dublin, which for the time were completely given over to plunder and devastation, and the city was, for a few days, in a state of blockade.

28. On the 25th May a large body of rebels, some 3000 strong, who had plundered the surrounding country of provisions, and established themselves on the hill of Tara, a steep ascent surrounded with ancient entrenchments, were attacked by the Reay Fencibles and Navan Cavalry and completely defeated and scattered, several hundred rebels being killed, while the loyalists lost only 32 in killed and wounded.

29. On the same day, the 24th May, risings also took place in other parts of the country. The town of Prosperous was taken possession of by the rebels, headed by Dr. Esmonde, an officer of yeomanry, who had made himself acquainted with the movements of the troops, and ascertained the pass-word, by treachery.

30. On the 24th May parties also attacked Naas, where they were repulsed, and Kilcullen, which they took and occupied for a few days. On the 25th, another large body of rebels attacked Carlow, rushing tumultuously into the town. They were, however, repulsed by the garrison, several hundred being killed without the loss of a single soldier.

31. During these movements, Ulster, to the general surprise, remained comparatively quiet. At Belfast, the place where the conspiracy had originated, no rising occurred; there was some fighting at Antrim, at Saintsfield, and at Ballynahinch; but in all the rebels were put to the rout, and after the first week order was re-established in this quarter.

32. It was in the county of Wexford, which had been one

of the most peaceable counties in the kingdom, and where the Orange system was not introduced until April 1798, that the rebellion raged most fiercely. In that county the rebels were headed by Father John Murphy, a parish priest. He soon found himself at the head of 4000 sturdy fellows armed with pitchforks and pikes.

33. On the 25th May he commenced his movements, and on the 26th he waylaid and destroyed a party of yeomanry, becoming possessed of their arms, ammunition, and horses. His force then went to Camden Park, the seat of Lord Mountmorris, and took possession of a quantity of arms there deposited. On the 27th May, Whit Sunday, when encamped five miles from Enniscorthy, they were most imprudently attacked by Lieutenant Foote with 110 men of the North Cork Militia, who were defeated and almost all killed. The same day the rebels marched to Ferns, burnt the Bishop's Palace there, and the next day attacked Enniscorthy, which was defended by 300 soldiers aided by the inhabitants. After some severe fighting the loyalists fled, and terrible scenes of plunder and slaughter ensued.

34. On the 29th, the rebels, now some 7000 or 8000 strong, about 800 of whom had fire-arms, marched to Wexford, and having destroyed a small body of troops who withstood them on the way, and captured two howitzers, they occupied the town without opposition. Here an executive committee was formed, and a camp established on Vinegar Hill, on the bank of the river Slaney opposite to Enniscorthy, and overlooking the town. After a few days the rebel force increased to quite 15,000 men, and was called the United Army of Wexford.

35. For nearly three weeks the rebels maintained their position on Vinegar Hill, sending out parties to plunder the surrounding country and bring in prisoners, all Protestants, who were immediately put to death. Besides the camp on Vinegar Hill, the rebels occupied two other positions; Carrickbyrne on the road leading to Ross; and the hill of Corrigua, seven miles from Gorey, and they contemplated making a descent on Dublin.

36. On the 1st June, the rebels advanced on Gorey, but were defeated by the loyalists under General Loftus with a loss

of 400 men. On the 2nd, Newtonbarry was attacked and the rebels again beaten, with a loss of 400 killed.

37. On the 4th, Lord Loftus, supported by Lord Ancram, with a regiment of militia and dragoons, and by Captain MacManus with two corps of yeomanry, with three guns, left Gorey to attack the rebel force on the hill of Corrigua. While passing through the defile of Tubberneering, the troops fell into an ambuscade formed by the rebels, and were completely defeated with great loss ; the guns, colours, &c. being taken.

38. On the 5th June, the rebel corps from Carrickbyrne, numbering some 10,000 men, under Dagenal Harvey, attacked New Ross, garrisoned by 1400 militia, and drove them from the town ; but when indulging in a carouse after their plundering, they were attacked by the garrison and driven out.

39. On the 9th June, the rebels were again defeated at Arklow, in Wicklow, with great loss, and then decided to concentrate all their forces on Vinegar Hill. Infuriated by their defeat at New Ross, the rebels committed frightful atrocities, massacring 200 prisoners, taken by them at different times, in cold blood ; a great number of these, consisting partly of women and children, were forced into a barn, and there burnt to death.

40. By the 20th June, General Lake had collected about 13,000 men of the regular and militia forces, with artillery in proportion, in the neighbourhood of Vinegar Hill. On the 20th, the rebels at Carrickbyrne, under the command of Father Philip Roche, marched to attack a body of loyalists under Sir John Moore, who, with 1200 men and a train of artillery, had landed at Ballyhack Ferry on the 18th, and was advancing to meet General Lake. The encounter took place on the 20th, the fighting going on from 3 p.m. until dark ; the rebels fought well, and only the arrival of two more regiments under Lord Dalhousie, just before dusk, compelled them to retreat ; but they had delayed Sir John Moore sufficiently to prevent his taking part in the assault on Vinegar Hill on the next day.

41. At 7 a.m. on the 21st June, a heavy fire from guns and mortars was opened on the rebel position on Vinegar Hill,

occupied by some 20,000 of the insurgents. After the cannonade the troops advanced in six columns to the assault. After an hour and a half of desperate fighting the rebels fled down one side of the hill, where no troops were posted, leaving 400 dead on the field, a large quantity of plunder collected by them, and the 13 guns they had taken in previous engagements with the loyalists. The royal troops lost about 200 killed and wounded. At the same time a body of troops, under Generals Johnston and Eustace, attacked the rebels in Enniscorthy, and after an obstinate fight drove them across the bridge over the river Slaney leading to Vinegar Hill. In this affair the royal troops lost 93 killed, wounded, and missing; the rebel loss is not known.

42. The rebels, after the complete defeat sustained by them at Vinegar Hill, were greatly disorganized, and retreated in two columns, one by Gorey, to the Wicklow Mountains; the other to Wexford. Those in Wexford were soon dispersed. Those in Wicklow, owing to the nature of the country, were difficult to dislodge, but after trifling advantages gained by them on June 10th and July 2nd, they were completely beaten and dispersed on the 4th July, 1798. The victory of Vinegar Hill, by which the strength of the rebellion was broken, was unfortunately followed by great excesses and outrages committed by the troops, especially by the Hessian contingent. In Enniscorthy and the neighbourhood many individuals were put to death by the soldiers, and a house used by the rebels as a hospital was set on fire and many sick and wounded burnt to death. On the other hand, the rebels in their retreat murdered many of the loyal peasantry who fell into their hands.

43. The severe measures taken by Earl Camden, when Lord-Lieutenant, such as the free-quartering of the troops on the inhabitants, had not been approved by the English Government, and that nobleman was replaced by Lord Cornwallis, who took the position of both Lord-Lieutenant and Commander of the Army in Ireland, at the request of Mr. Pitt. He arrived on the 20th June, and on the 2nd July issued a proclamation, authorizing the King's generals

in Ireland to give protection to all rebels not having been actually engaged in the civil war, who surrendered their arms, abjured all unlawful engagements, and took the oath of allegiance to the King.

44. On the 17th July, the Irish House of Commons approved, by an address, his Excellency's conduct, and afterwards passed an Act granting an amnesty to all who had been engaged in, or connected with, the rebellion, except the leaders, and those who had, when not engaged in battle, been guilty of murder or manslaughter.

45. It will be seen that this rebellion, which was initiated under the direction of the United Irishmen, with the political aim of dissolving the connection with Great Britain, by the aid of France, and establishing Ireland as an independent republic, became, in fact, almost completely a religious war between Protestants and Catholics. The rebels were with difficulty restrained by their more moderate leaders from massacring every Protestant, and, as it was, committed frightful massacres and outrages among them. On the other hand, the Irish loyalists were mostly Protestants, as well as the Houses of Parliament and principal persons of the country. These were reported by Lord Cornwallis as in general averse to all acts of clemency. "The words 'papists' and 'priests' are for ever in their mouths, and by their unaccountable policy they would drive four-fifths of the community into irreconcilable rebellion."

THE FRENCH INVASION.

46. When the Irish Rebellion of 1798 actually broke out in May of that year, the French Directory, after consultation with Wolfe Tone, decided to support it with an expedition, the attention of the English being diverted by several small detachments landing at different places, while the main force should land on another and a distant point. The force destined for this expedition was divided into three bodies. General Humbert with 1000 men was at Rochelle; General Hardi with 3000 men was at Brest; General Kilmaine with 6000 was in reserve. While

the rebellion was proceeding, and until it was crushed at Vinegar Hill, no action was taken, but when in July and August fresh risings occurred in Mayo, Sligo, Roscommon, and Galway, General Humbert embarked his force, consisting of 1000 men, with arms for 1000 more, in three frigates and a smaller vessel; and on the 22nd August landed at Killala in the county of Mayo, when he was immediately joined by a number of influential gentlemen, mostly Catholics. Humbert remained at Killala till the 25th of August, when, leaving 200 men there as a garrison, he advanced into the interior. On the 26th, he occupied Ballina, and the next day advanced to Castlebar, where General Lake opposed him at the head of a greatly superior force of Irish militia. When the French attacked, this Irish militia fled, most of them immediately joining the French. Humbert continued his advance, his force being swollen by accession from the gentry and peasantry of the district, and on the 5th September defeated and drove back to Ballyshannon a small force under Colonel Vereker.

47. Meanwhile Lord Cornwallis was advancing, and on the 8th September met General Humbert at Ballinamuck with a greatly superior force. The French General surrendered, with 748 privates and 96 officers. His Irish auxiliaries, for whom he made no terms, fled in all directions, many being overtaken by the troops and slaughtered without mercy. A body of from 3000 to 6000 rebels, chiefly armed with pikes, who were marching to meet Humbert, were met and defeated at Granard by Captain Cottingham, with a force of only 157 infantry and 49 cavalry. The troops then advanced to the coast, and on the 23rd drove the French insurgents out of Killala, making many prisoners.

48. When the news of the successes of General Humbert reached France, the Directory determined to support him by the troops under General Hardi, who sailed on the 20th September, with one ship-of-the-line, eight frigates, and a schooner, with about 3000 troops on board. The fleet was commanded by Admiral Bompart. He arrived off the entry of Lough Swilly, on the north coast of Ireland, on the 10th October, having been detained by contrary winds,

with the line-of-battle ship the 'Hoche,' two frigates, and a schooner. Their arrival was instantly signalled, on the 11th an English squadron under Sir John Borlase Warren bore down upon them, and after a fight of several hours the French vessels were taken. Four of the frigates that had been dispersed were also taken, and only two of the ten vessels that left Brest got back to France. Wolfe Tone was one of the prisoners taken on board the 'Hoche'; he was taken to Dublin, tried by a court-martial on the 10th December, and sentenced to death, but he died in prison, while his case was being considered, from a self-inflicted wound.

49. A French brig, with a few French soldiers and some Irish refugees, under Napper Tandy, at the same time anchored in the harbour of Rutland Island, on the coast of Donegal. Part of the men landed, but meeting with no support, and fearing the British cruisers, sailed again for the coast of Norway.

50. On the 7th June, 1799, the Bill effecting the Legislative Union of Great Britain with Ireland passed the Irish House of Commons, much against the popular feeling in that country, the vote having been secured to a large extent by corrupt means. Subsequently, a promise of Roman Catholic emancipation was given, which did much to secure the general tranquillity that prevailed.

51. Dwyer, with a few followers in the mountains of Wicklow, was all that remained of the late formidable rebellion, and the symptoms of discontent in other parts of the country were few. Yet the Government was well aware that the elements of insurrection were still ready at hand, and that the disaffected were kept down only by fear. During the latter part of the year 1800 the utmost alarm was excited by new threats of invasion by France; Lord Cornwallis announcing his conviction that if an enemy landed in Ireland a great part of the population would rise up and join him.

IRELAND IN 1803.

159 In 1803 coercive measures became again necessary towards Ireland, and an Act of the Parliament of the United

Kingdom was passed, at the instance of Mr. Pitt, framed in the same words as the Irish Statute, except that it declared that the courts-martial should be constituted of commissioned officers, not less in number than seven, nor more than thirteen, and that no sentence of death should be given unless two-thirds of those present concurred therein.

Mr. Pitt stated in introducing the Bill that it was "not one to enable the Government in Ireland to declare Martial Law in districts where insurrection existed, for that was a power which His Majesty already possessed; but a Bill for the protection of the lives and properties of loyal subjects, and the better suppression of insurrection and rebellion; its object being to enable the Lord-Lieutenant, when any persons shall be taken in rebellion, to order them to be tried immediately by a court-martial." Mr. Pitt disclaimed the intention of giving the power of superseding, by Martial Law, the operation of the civil Code, nor to deprive the subject *in civil cases* of the advantages derived from the ordinary course of the law of the land.

The Bill was passed, and followed by another suspending the action of the *Habeas Corpus* Act, to enable the Government to arrest and detain suspected persons, who could then be tried by the ordinary law.

SKETCH OF THE IRISH INSURRECTION OF 1803.

1. During 1802 armed risings had occurred in the south of Ireland of discharged militiamen and peasantry, the alleged grounds of discontent being the dearness of provisions and the ejection of tenants from the land. Many outrages were committed, and in the counties of Limerick and Tipperary the disturbances became very general and alarming. It is supposed that these risings were in some measure in concert with the plot of Colonel Despard in England to bring about a rising in London simultaneously

with a mutiny among the troops, who were to murder the King and seize the city, and for which that officer and six of his confederates were executed. The disturbances in Ireland were suppressed before the end of 1802, a number of prisoners being taken, who were tried in January 1803 before a special commission, but no executions took place.

2. The attempt at insurrection in 1802 was renewed in 1803; Robert Emmett, the brother of Thomas Emmett, one of the leaders of the rebellion of 1798, being the principal instigator. He had been some time in Paris, and it was said that he had been urged to renew the Irish insurrections by Napoleon, then First Consul, while the negotiations for peace were pending with Great Britain. In France a body called the Irish Legion was formed, consisting of all the disaffected Irish in that country. A tri-coloured flag with a green centre and the monogram R. I. for *République Irlandaise* was adopted, with a rallying cry of *L'Indépendance de l'Irlande—Liberté de Conscience.*

3. The war between France and England, concluded by the Peace of Amiens in October 1801, again broke out in May 1803. Emmett returned to Ireland in October 1802, and immediately set about organizing an insurrection, in which he was joined by many leaders of the disaffected, including Dwyer, the Wicklow outlaw, who had remained since 1798 uncaptured in the mountains. Several secret magazines and workshops were established in Dublin. An explosion in one of these on the 16th of July, with other suspicious occurrences, put the authorities on the alert, and induced Emmett to anticipate matters, and to fix the 23rd July for the rising. A scheme for the government of the Irish Republic was prepared, as well as a long manifesto, addressed "to the people of Ireland," with a shorter address to be put in circulation when the insurrection broke out. The plan of Emmett and his co-conspirators was to make a simultaneous attack in Dublin on four points—the Pigeon-house, the Castle, Island Bridge, and Cork Street barracks.

4. On the 23rd July, great numbers of peasants entered Dublin, and towards evening vast crowds were collected in St. James' Street and its neighbourhood. As night ap-

proached, agents of the conspirators placed pikes along the sides of the streets, with which many of the crowd armed themselves; the authorities and the police do not appear to have interfered. About 9 p.m. a number of men rode furiously through the streets to give the signal for attack; a gun was discharged and a rocket let off. Emmett, then, at the head of a few men, sallied forth from his head-quarters in Marshalsea Lane, and brandishing his sword called on the conspirators to follow him to the Castle. Before they reached the end of the lane one of the party fired and killed Colonel Browne, a passing officer; but when he reached the market in Thomas Street and looked round, Emmett found that only some twenty were following him, the remainder having dispersed to murder and plunder the inhabitants. Emmett then disappeared. The mob attacked many people objectionable to them, and killed Lord Chief Justice Kilwarden and his nephew, who happened to be passing at the time.

5. Some time elapsed before any force could be collected to send against the ruffians, who were plundering houses and committing other excesses, including several murders besides that of Lord Kilwarden and his nephew. At about 11 p.m. a party of some 120 soldiers marched against the insurgents in Thomas Street; there was some fighting, but after a few discharges from the troops the insurgents fled. In their flight they encountered the guard at the Coombe, who fired upon them, and they quickly dispersed. Emmett fled to the mountains of Wicklow, but was soon betrayed into the hands of Government.

6. On the commencement of disturbances in Dublin, the Privy Council issued a proclamation, calling on the magistrates to unite their exertions with those of the military power to restore order. The Lord Mayor of Dublin also ordered all the inhabitants of that city, except members of the yeomanry, not to leave their houses after 8 p.m. Large bodies of troops were sent over from England, and Bills for suspending the *Habeas Corpus* Act, and for placing Ireland under Martial Law, were passed through Parliament with great rapidity.

INSTANCES—IRELAND, 1833.

160 In 1833, owing to disturbances in Ireland, an Act was again passed which sanctioned the establishment of courts-martial for the trial of ordinary criminal cases. The Bill was entitled, "for the more effectual suppression of local disturbances and dangerous associations in Ireland." By it the Lord-Lieutenant was authorized to suppress meetings which his law advisers deemed to be illegal; to proclaim any district to be in a state of disturbance; and to warn the inhabitants not to be out of their houses between sunset and sunrise. Public meetings to petition Parliament were not to be held without ten days' previous notice being given to the Lord-Lieutenant. *Persons arrested under the Act were to be tried by court-martial.* No persons to keep arms on their premises after receiving notice to give them up. The circulation of seditious papers was to be constituted a misdemeanour, and persons destroying the property of those who had been prosecutors, witnesses, or jurors, were to be tried by court-martial and incur the punishment of transportation.

IRELAND IN 1848.

161 When armed insurrection appeared imminent in Ireland in July 1848, the Government at once introduced a Bill for the suspension of the *Habeas Corpus* Act, which was rapidly passed through both Houses, and approved by the Queen. Those portions of the country in which the greatest disaffection existed were at the same time placed under the Crime and Outrage Act, which authorized the Government to disarm the inhabitants and take other necessary precautions. Owing to the feeble nature of the insurrection, and the ease with which it was suppressed, no occasion arose for the

proclamation of Martial Law; the rising in Wexford, headed by Smith-O'Brien, being opposed by the constabulary, and the prisoners tried by special commission. This in no way proves that Martial Law may not again have to be used in the United Kingdom, but merely that the insurrection on this occasion was so weak and unsupported, that the civil power was never sufficiently powerless to render recourse to military jurisdiction necessary.

SKETCH OF THE IRISH REBELLION OF 1848.

1. Between 1803, the date of Emmett's insurrection, and 1848, many events had occurred which greatly affected the condition of Ireland. In 1829 the Roman Catholic Relief Bill was passed, which removed the disabilities under which the Roman Catholics had hitherto laboured. By it Roman Catholics were permitted to sit and vote in Parliament, and on taking the oath of allegiance, to hold civil and military offices under the Crown, with the exception of a very few, among which were those of Lord-Lieutenant and Lord-Chancellor of Ireland.
2. Shortly before this O'Connell had commenced his agitation for the Repeal of the Union, and murders and outrages had been frequent throughout the country. In 1832 the Reform Bill was passed; and in 1838, to meet the frightful distress existing in the country, the Poor Law was introduced. Notwithstanding this the crusade against the owners of land continued, and midnight murders and assassinations continued to be frightfully common. In 1840 the "Young Ireland" party was formed.
3. In 1846, while the most terrible crimes, arson and midnight murder, were prevalent, the distress among the people, owing to the potato disease and to want of employment, was dreadful. Parliament authorized large grants of money for the relief of distress and the prosecution of public works, the amount voted in 1847 amounting to no less than ten million pounds, while 500,000 able-bodied

men were employed in relief works. Much was also done by private charity, but all was insufficient to prevent fearful suffering and many deaths from starvation, while the amount of crime in the country was appalling.

4. In July 1846, Mr. William Smith-O'Brien and the "Young Ireland" party, who advocated physical force, seceded from the Repeal Association organized by O'Connell, and in May 1847 O'Connell died. Mr. William Smith-O'Brien was the brother of Sir Lucius O'Brien, Bart., who represented Clare in Parliament, and himself for some time was member for the county of Limerick, where his family possessed considerable property, he himself having large estates in Munster.

5. The distress which so long reigned in Ireland, acting on the discontent and disaffection already existing, made the people rife for insurrection. During the famine the starving peasantry, driven to desperation, had committed many excesses to gain food, and had, at the same time, taken the opportunity to supply themselves with fire-arms, and had surreptitiously exercised themselves in drill and shooting.

6. In February 1848 occurred the revolution in Paris, and the French Republic was proclaimed and established. When the intelligence of this movement reached Dublin, Messrs. Smith-O'Brien, Meagher, and O'Gorman, the leaders of the Young Ireland party, went to Paris, to endeavour to obtain assistance from the French Republicans in their attempt to make Ireland independent, but they received no encouragement and returned greatly disappointed. They again went to Paris when the French Republic was provisionally established, and on the 3rd April presented addresses of congratulation to M. Lamartine in the name of the people of Ireland.

7. On the 5th April, a meeting of "Confederated Young Irelanders" was held in Dublin, attended by about 3000 persons, at which exciting speeches were made, and the prospect of a Republican Government in Ireland held out. About the same time the Young Irelanders were purchasing arms, pikes were openly manufactured and sold in large

numbers, and the authorities were making the necessary preparations to repress an outbreak.

8. John Mitchell, editor of the *United Irishman*, was tried on the 23rd May for sedition, sentenced to 14 years' transportation, and sent to Australia in an armed steamer a few hours after sentence was passed. On the 24th June, a new paper called the *Irish Felon* was started in Dublin, which, together with the *Nation* newspaper, daily addressed violent articles to the Irish people, advocating armed rebellion.

9. A grand celebration of the anniversary of the Battle of the Boyne, on the 12th July, by the Orangemen of Ulster, exasperated the Irish Confederates, who immediately afterwards determined to undertake an armed insurrection. This determination was made known by informers to the Government; a Bill for the suspension of the *Habeas Corpus* Act was at once introduced, passed through the House of Commons in one day, and on the 24th July was passed in the same manner by the Lords.

10. On Saturday the 22nd July, Smith-O'Brien was at Enniscorthy, near Wexford, where he was joined by Meagher and others, who informed him that the suspension of the *Habeas Corpus* Act was before Parliament, and that the Insurrection Act was prolonged to the 1st March, 1849. The conspirators then determined on immediate action.

11. On Sunday the 24th July, 1848, O'Brien, dressed in a martial costume, addressed a large assembly of the colliers and small farmers of the surrounding district, gathered together at Enniscorthy, and on the three following days he and his companions moved from place to place followed by 200 or 300 of the armed peasantry, and endeavoured by their inflammatory speeches to excite the people to insurrection. A few hundred armed peasants joined them, and revolutionary movements took place in the counties of Kerry, Galway, Wexford, Carlow, Queen's, Kildare, Louth, Westmeath, and Cavan.

12. The same week these counties and some isolated districts in others were proclaimed under the Crime and Outrage Act, in accordance with which the disarmament

of the inhabitants was immediately carried out. At the same time a proclamation was issued by the Government, declaring the Confederate clubs illegal, and offering a reward of £500 for the apprehension of O'Brien, and £300 each for the apprehension of Meagher, Dillon, and Doheny, these four having been hitherto the most daring of the conspirators.

13. The appeal of the conspirators to the people did not meet with the ready response which they expected, principally because the Roman Catholic priesthood held altogether aloof from their designs, fearing the tendencies to infidelity and red-republicanism produced by sympathy with Revolutionary France.

14. On Friday the 29th July, O'Brien and his friends returned to Enniscorthy, and next day the former, at the head of about 300 men, variously armed, left that place for Ballingarry. When he approached this town, his followers had increased to about 3000 men, all carrying fire-arms, pikes, or blunderbusses. On Boulagh Common, about three miles from Ballingarry, they met a body of police, not more than 50 in number, under Inspector Trant, who were in search of O'Brien, but did not expect to find him at the head of such a numerous body. As the insurgents attempted to surround the party, Inspector Trant and his men ran into a solitary farm-house close by, a substantial structure roofed with slate, and surrounded by a court-yard enclosed by a wall; this they prepared for defence, securing the doors and blockading the windows with furniture. O'Brien at first endeavoured to induce the police to give up their arms, but failing in this, he and his men attacked the house, returning the fire of the inmates, and attempting to force the doors and windows. At the end of half-an-hour, another detachment of police arrived under Inspector Cox, and the rebels fled. O'Brien, after concealing himself for some time behind a cabbage-bed in the garden, succeeded in getting to Thurles, where he was arrested by a railway-guard as he was about to enter a train. Meagher, O'Donoghue, M'Manus, and several others were also apprehended.

15. About the same time the *Nation* and *Irish Felon* news-

papers were suppressed, and the presses and types as well as all documents on the premises were seized. The trial of the prisoners by a special commission commenced at Clonmell on the 21st September, 1848, and after a trial lasting five weeks, all were found guilty and sentenced to death. None of them were, however, executed, but were transported for life to Australia. Thus the insurrection, which at one time threatened to lead to a fearful contest in Ireland, was suppressed, and its leaders covered with ridicule.

CHAPTER VI.

INSTANCES OF THE USE OF MARTIAL LAW IN THE BRITISH COLONIES.

BARBADOES—1805.

162 In May 1805 the Governor (Lord Seaforth) proclaimed Martial Law from the 19th to continue to the 21st, but afterwards prolonged it to the 25th May. The local Assembly objected that the Governor's proclamation was illegal, as according to the Militia Act of the island, "Whatever Articles of War or military laws shall be by the Governor or Commander-in-Chief of this island made, by and with the advice and consent of the major part of the Council of War here, shall not commence or begin until an enemy, sufficient to cause an alarm to the whole island, *appear in sight*," and were to discontinue as soon as the enemy had gone out of sight of the island.

The Governor referred the address to the Colonial Office, and in July replied:—"I am instructed that the preservation of Her Majesty's prerogative of declaring Martial Law is essentially necessary towards that end, as without that power no security can be had for the safety of the colony."

BARBADOES—1816.

163 In April 1816 a rebellion broke out. Martial Law was again proclaimed, and continued in force until July

12th. While the proclamation was in force courts-martial sentenced many of the rebels to death.

CEYLON—1817.

164 Martial Law was declared in Ceylon in 1817.

DEMERARA—1823.

165 Owing to discontent among the slaves in Demerara a rebellion broke out on the 18th August, 1823, and on the 19th the Governor, with the sanction of the Court of Policy, declared Martial Law, which remained in force until January 15th, 1824. On the 22nd August an amnesty was proclaimed, with a warning, "That those remaining in arms after 48 hours must be dealt with as rebels, and place little hope in mercy."

The Rev. John Smith was tried on the 13th October for acts done from the 17th to the 20th August, those of latest date being in defiance of the proclamation. He was sentenced to death on the 24th November, but sentence was not executed, and he died in gaol on the 11th February, 1824.

1. Mr. Brougham moved an address declaring the "alarm and deep sorrow" of the House at this "violation of law and justice;" and in supporting his motion argued that no power to declare Martial Law existed; that if it was proclaimed it should cease when the necessity for it ceased; and that in this case it had been continued after all danger was over. Sir James Mackintosh supported the motion in a very able and valuable speech, in which he laid down the justification for Martial Law, its nature and term of duration, in words already, in part, quoted.

JAMAICA—1831-2.

166 Martial Law was proclaimed on the 30th December, 1831, by the Governor, with the unanimous sanction of the

Council of War, and continued in force until the 5th February, 1832. The proclamation in this case seems to have taken the form of an order calling out the militia, and placing them under the Articles of War. The Governor, the Earl of Belmore, acting in his position of Captain-General, gave his orders to the Major-General in command, and placed the troops at his disposal.

CAPE OF GOOD HOPE—1835.

167 The border tribes having revolted and attacked the English settlers, Sir B. D'Urban, on the advice of the Attorney-General and with the unanimous assent of the Executive Council, placed the district under Martial Law, by proclamation dated January 3rd, 1835. By this proclamation it was directed that "Martial Law shall be in force" within the disturbed districts, "for all cases and in all matters connected with the assembling and conducting of the forces, and shall continue to be in force until the expulsion of the said invaders, unless proclamation to that effect shall be previously made."

1. Over certain districts Martial Law was revoked on the 17th June, 1835, and 9th July, 1836, and over the whole country on August 18th, 1836. On the 29th August, 1836, the Legislative Council having passed an Act of Indemnity, condoning all acts, "provided that such acts, matters, and things shall have been done, ordered, directed, or authorized *bonâ fide*, in furtherance and in the execution of the objects for which Martial Law was proclaimed as aforesaid." Lord Glenelg, Colonial Secretary, directed that the wording of the Act should be amended to condone "all acts necessarily or properly done," &c.

CANADA—1837-8.

168 On the 6th December, 1837, the Colonial Secretary, Lord Glenelg, wrote to the Governor of Lower Canada, pointing

out that the proclamation of Martial Law might become necessary to suppress the rebellion, and further, "It is superfluous to state with what caution and reserve this ultimate resource should be resorted to, and that it ought to be confined within the narrowest limits which the necessity of the case will admit;" but if necessary for the protection of the loyal and peaceable subjects of the Crown, the responsibility must not be declined. On the 5th December, before this despatch reached the colony, the Executive Council, with the advice of the local law officers, sanctioned the proclamation of Martial Law by the Earl of Gosford, the Governor, in the district of Montreal.

1. This proclamation authorized the military authorities "to arrest and punish all persons acting, aiding, or in any manner assisting in the said conspiracy or rebellion," "according to Martial Law, either by death or otherwise, as to them shall seem right and expedient." Instructions were at the same time sent to Sir John Colborne, the Lieutenant-General commanding the forces, directing him to use "the unlimited power with which you are now invested," as far as possible in co-operation with or subordination to the ordinary law, and to revert to the assistance of the civil authorities wherever possible: a course of action Sir John reported he would certainly adopt.
2. Martial Law continued in force until the Governor of the province recalled his proclamation of it on the 27th April, 1838.

CAPE OF GOOD HOPE—1846.

169 Martial Law was declared at the Cape in 1846, on the occasion of the Kaffir War there. On the 21st April, in the eastern districts only. On the 22nd April, throughout the whole colony, as regarded the assembling, embodying, conducting, and supplying Her Majesty's forces, and the

inhabitants enrolled and embodied. On the 25th April, to enable the Burgher levies to be moved to the scene of operations.

On the 13th January, a proclamation was issued that Martial Law should cease, and on the 11th March, 1847, the Colonial Legislature passed an Act of Indemnity.

CEYLON—1848.

170 On the 29th July, 1848, the Government of Ceylon proclaimed Martial Law, until further orders, on account of the rebellion in the island.

The proclamation was revoked on the 4th October, Martial Law ceasing entirely on the 10th October, 1848.

A local Act of Indemnity framed on the model of the Irish Act of 1798 was passed, and the Governor and naval and military authorities were publicly thanked for their conduct.

1. In February 1849, the propriety of declaring Martial Law in this instance and the mode of carrying it out was questioned in the House of Commons, and a Committee of Inquiry was appointed by the House, which sat in 1849 and 1850, presenting their report to Parliament in March 1850. The proceedings of, and evidence taken before, this Committee throws valuable light on the question of the exercise of Martial Law, and has been quoted to a considerable extent.

CEPHALONIA—1849.

171 Owing to insurrection in the Ionian Islands, then under the Protectorate of England, the Governor, Sir H. Ward, with the concurrence of the Senate, proclaimed Martial Law on the 30th August, 1849, throughout those districts of the island to which the insurrectionary move-

ment, which had been marked by the commission of acts of atrocity, had extended, and to all other districts to which it may extend.

Between the 31st August and the 27th October, 1849, there were 68 courts-martial; 44 persons were sentenced to death, 21 being executed; others were flogged, or banished from the island.

1. Martial Law was taken off some districts on the 22nd, and an amnesty proclaimed on the 24th October, 1849.
2. The Legislature and local authorities passed votes of thanks to the Governor, whose conduct and that of the troops was also approved by the Home Government. Nevertheless, an address asking for inquiry was proposed in the House of Commons, but was not carried.

CAPE OF GOOD HOPE—1850-1.

172 Martial Law was proclaimed in certain districts at the Cape of Good Hope on the 25th December, 1850, in order to give power to the Government to use the resources of the country with promptitude and energy for the suppression of a rebellion on the Kat river.

1. The Governor, Sir Harry Smith, appears to have considered that by the exercise of Martial Law he was bound by the Mutiny Act; but on the question being referred to the local law officers, it was pointed out that under Martial Law the Commander-in-Chief becomes practically a Dictator, and acts on his own responsibility without reference to Military Law.
2. Regulations for the administration of Martial Law were issued by Sir George Cathcart, who was then Governor, in May 1852, directing all persons in Kaffraria, the proclaimed district, to obey the orders of the chief military authority and the officers under him. Martial Law was withdrawn in 1853, and a local Act of Indemnity passed.

ISLAND OF ST. VINCENT—1862.

173 Owing to insurrection in the island, Martial Law was proclaimed in St. Vincent by the Lieutenant-Governor on the 30th September, 1862, with the advice and consent of the Executive Council.

During the time Martial Law prevailed, no courts-martial were assembled, but four men were killed and four men wounded during the riots. The persons arrested under Martial Law were subsequently tried by the civil tribunals, and 127 convicted of felony.

1. An Act was passed by the Local Legislature declaring the proclamation to have been lawfully issued, and indemnifying those concerned in carrying Martial Law into execution. Martial Law remained in force in the island until October 20th, 1864.

JAMAICA—1865.

174 The exercise of Martial Law in Jamaica in 1865 is the most important instance of its use in the British dominions in modern times, principally on account of the light thrown on the manner of its execution, and the legal proceedings arising therefrom.

An outbreak of the Negro population took place in the parish of St. Thomas, on the 11th October, persons in authority being killed.

On the 12th, a Council of War assembled at Kingston, and sanctioned the issue of a proclamation of Martial Law by the Governor.

SKETCH OF THE INSURRECTION IN JAMAICA IN 1865.

1. Disaffection had existed among the negroes in the island for some time, and agitators had been stirring them up to rebellion.

2. On the 7th October, at the Court of Petty Sessions at St. Thomas, a prisoner was rescued by negroes armed with sticks. On the 9th, the arrest of the ringleaders at this rescue, by the police, was violently resisted by 200 negroes, and the policemen were made prisoners. On the 12th, the Police Station at Morant Bay was attacked by a mob of 400 or 500 persons with cutlasses, spears, and guns, and arms captured by them. A conflict with the Volunteers then took place, in which the Custos, or Lord-Lieutenant, and 15 persons, were killed and 18 wounded; great atrocities were said to have been committed by the negroes. Subsequently much damage was done by the rioters to estates and buildings, &c., until the insurrection was quelled by military force.
3. In Jamaica, at that time, the Governor was authorized by Local Statute, with the advice of a Council, to proclaim Martial Law in any disturbed district to last for 30 days, when it could be renewed in the same way. On 13th October, 1865, Governor Eyre proclaimed Martial Law in the county of Surrey, except in the city and parish of Kingston.
4. Mr. Gordon, an agitator and ringleader of the rioters, was arrested at Kingston on the 20th October (*i. e.* in a place out of the proclaimed district) by order of the Governor, and handed over to the commanding officer of the troops, Colonel Nelson, at Morant Bay, a place where Martial Law prevailed, with instructions to try him by court-martial on such charges as might seem advisable. A court-martial was assembled, consisting of a Lieutenant R.N. as President, another Lieutenant R.N., and an Ensign of a West India Regiment as members. Mr. Gordon was tried on the 21st October for high treason and for complicity in acts committed on the 11th October (*i. e.* before the date of proclamation), convicted and sentenced to death. The proceedings were confirmed by the officer commanding the troops in the island (General Codrington), who approved, and said that the state of affairs in the colony called for prompt and immediate action. Gordon was executed on the 23rd of October.
5. Subsequently an Act of Indemnity was passed by the

Local Legislature for all officers who had rightly administered Martial Law in good faith.

6. Nevertheless, an indictment for murder against Governor Eyre was afterwards presented to a Grand Jury in London, resting on the following counts :—

1. That the *locality* of arrest was not under Martial Law.
2. That the crime was committed prior to the date of proclamation.
3. The evidence was documentary only and insufficient.
4. That the state of Martial Law was prolonged beyond the necessary time.

7. With regard to the first count, Judges differed. One stated, that as by the general law all crime is local and must be tried where committed, the Governor was justified in bringing Gordon into the proclaimed district for trial. Others, however, considered that crime being local, an offender should only be arrested and tried within the area in which Martial Law is in force. As regards the second count, the balance of opinion was that no proclamation of Martial Law can have a retrospective effect. Hence, when Martial Law is partially proclaimed and is limited to time, the committal of the offence, arrest, and trial must be within the specified limits of time and place. As concerns the last count, it was considered that the Governor was under no obligation to rescind the proclamation. The objection to the insufficiency of evidence (third count) was not much argued, the Court's opinion being allowed as decisive.

8. The Grand Jury threw out the Bill, but strongly recommended that Martial Law should be more clearly defined by legislative enactment.

9. Governor Eyre was therefore considered to have acted wrongfully in arresting Gordon out of the proclaimed district, and transferring him to the proclaimed district for trial; also, that as he committed the crime before the proclamation of Martial Law, Gordon should only have been tried by civil law. It was, however, acknowledged that Governor Eyre had acted in good faith, and had brought the colony safely through a great danger, so that notwithstanding these errors protection was afforded him.

10. In April 1867 an indictment for murder was laid against Colonel Nelson, and presented to a Grand Jury in London; but the bill was thrown out, after the charge by Lord Chief Justice Cockburn, who said that the arrest of Gordon at Kingston by Governor Eyre and removal to Morant Bay was illegal; but Colonel Nelson was not responsible for this, and that it was not part of his duty to ascertain how Gordon was brought there, and that he did right to execute a rebel.

11. The Lord Chief Justice also said:—"No one, I think, who has the faintest idea of what the administration of justice involves, could deem the proceedings on this trial consistent with justice; or, to use a homely phrase, with that fair play which is the right of the commonest criminal. All I can say is, that if on Martial Law being proclaimed a man can lawfully thus be tried, condemned, and sacrificed, such a state of things is a scandal and a reproach to the institutions of this great and free country. I enter my solemn and emphatic protest against the lives of men being thus dealt with in time to come."

CHAPTER VII.

MARTIAL LAW DURING OCCUPATION OF A FOREIGN COUNTRY.

IN TIME OF PEACE.

175 When an army is occupying foreign territory in time of peace, Martial Law can only be proclaimed by order of the Home Government, and with the sanction of the Government of the country occupied, and would only be justifiable in case of necessity. Such necessity might arise from insurrection, civil disturbance, or similar cause, rendering the civil administration inoperative or too weak to ensure the safety and maintenance of the occupying force. Unless Martial Law was so proclaimed, the ordinary law of the country would rule in respect both to the civil population and to ordinary civil crimes committed by persons subject to Military Law. Where so proclaimed and exercised, Martial Law would be administered by the Commander-in-Chief in accordance with the law on the subject of the country occupied, or in accordance with such special regulations as might be laid down for the occasion by the Government of the country.

FRIENDLY TERRITORY IN TIME OF WAR.

176 When the foreign territory occupied by an army is not that of an enemy, but of an ally, Martial Law does not necessarily follow upon occupation. In such case the

necessity for Martial Law would depend upon the bearing of the population, the vicinity of the enemy, and other causes which might affect the power of the Government of the country to maintain order and take the measures necessary for the safety and subsistence of the occupying force. Martial Law could only be proclaimed with the sanction of the Government of the occupied territory, except in case of great emergency, when the Commander-in-Chief might exercise Martial Law on his own responsibility.

1. That it is better where possible to leave the ordinary law in force, and to work as much as possible by means of the ordinary civil administration of the country is shown by the following despatch of the Duke of Wellington :—
2. When the Duke of Wellington was commanding the army in Portugal in 1810, it was proposed to establish Martial Law there, to get over difficulties connected with the maintenance of the army. The Duke expressed his dissent to this course in a despatch to Mr. C. Stuart, the British Minister at Lisbon, dated Viseŭ, 19th April, 1810, as follows :—"I believe that there is no instance in history of the establishment of Military (Martial) Law, excepting with a view to restrain the people. We have no such object in Portugal,—what we want is :—
3. "1st. To make the magistrates do their duty. We may try them by court-martial or council of war for neglect of duty ; but what punishment would a court-martial inflict upon them for neglect of duty, however criminal, except dismissal from office ?—and that punishment can be inflicted by the Government at any time without trial.
4. "2nd. We want to induce the people to perform the duties, and to supply the articles, required from them by the law, and by the orders of Government. The law which imposes these duties, and requires these supplies and assistance for the armies, furnishes the means of its own execution, and imposes the penalties of non-performance of its provisions, and it is the duty of the inferior magistrate to inflict the penalty of the law for its breach.

5. "We are mistaken if we suppose that a peasant who has deserted from the militia, or the line, or who has avoided to give his grain, or his straw, or his bullocks, or to supply his cart when called for, will attend the General to receive the notification of his will regarding his punishment, or the sentence of a council of war. Inferior officers and persons must seek for him. If Military (Martial) Law is to supersede every other authority, the troops must be the executive officers of the law; they must be employed to seek and bring forward the criminal; and *probably at the period when the enemy may be in the province governed by this law, the troops must be employed in the civil government, instead of in opposing the enemy.* I wish these points to be materially considered before we go farther."

177 Troops occupying the territory of an ally in time of war are bound to comply with the laws of the country in which they are serving, in everything which does not concern their military duties.

1. In Portugal, in 1810, a British officer having carried off a young lady of the country, the Duke of Wellington in writing on the subject on the 25th March, 1813, declared that if called upon to deliver up the officer in question to the Portuguese tribunals, to be dealt with according to the Portuguese law, he would undoubtedly comply with their desire. He goes on to say:—
2. "The notion is too common among the officers and soldiers of the army that they are not obliged to obey the laws of the country in which they are acting; or, in other words, that they may act as they please, and may commit such outrages as they think proper, provided they do not offend against the Mutiny Act and Articles of War. I cannot, however, admit of such a doctrine; and (the officer in question) will be an instance that the laws of the country must be obeyed." On the same subject the Duke again wrote on the 18th May, 1813:—
3. "*Every independent Government has a right to order the trial of any individual residing in the country under its*

government by the tribunals, and according to the laws, of the country; and it is impossible for me to interfere in any manner."

HOSTILE TERRITORY IN TIME OF WAR.

178 When the territory occupied is that of an enemy, it stands, from the fact of its occupation, under Martial Law; which is the immediate and direct effect and consequence of hostile occupation or conquest. The presence of a hostile army proclaims its Martial Law.

1. The Martial Law here referred to is, as was laid down by the Duke of Wellington, the will of the General enforced on the inhabitants in accordance with the universally acknowledged right of the conqueror to impose such law as he may think proper on the conquered. This right, in modern days, is limited by the laws and usages of war as recognized by civilized States.
2. The Government of America, in April 1863, during the Great Civil War between North and South, issued instructions for the guidance of their armies during the war. These instructions are based on the most modern and merciful view of the usages of war, and are largely quoted here as applicable to occupation by English troops.

179 The question as to the application of Martial Law to invaded territory was carefully considered by the law officers of the Crown in 1855, with reference to its extension to the harbour and roadstead of Balaclava, then part of an enemy's territory in the hostile occupation of Her Majesty's forces. The following was their opinion :—

1. "It is competent to Her Majesty's commanders to declare that Martial Law shall prevail in the territory of which they are thus in the armed occupation, and, under the sanction of military authority, to lay down rules which they deem essential to be observed for the preservation of

Her Majesty's forces and military stores. To these rules all persons resorting to this territory (not being in the military or naval service of an independent Sovereign) would be bound to yield obedience. During the time that an invading army is in hostile occupation of any portion of an enemy's country, all native laws and tribunals are suspended, and there can be no law, nor any executive for the administration of law, but that which is appointed and declared for the time being by the supreme military authority." (*Thring's Criminal Law of the Navy*, p. 161.)

NATURE OF MARTIAL LAW.

180 Martial Law in a hostile country consists in the suspension by the occupying military authority of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation. (*American Instructions.*)

1. All civil and penal law shall continue to take its usual course in the enemy's places and territories under Martial Law, unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government—legislative, executive, or administrative—whether of a general, provincial, or local character, cease under Martial Law, or continue only with the sanction, or, if deemed necessary, the participation, of the occupier or invader. (*American Instructions.*)
2. The law administered by an occupying General to the inhabitants has been rightly defined as the will of the conqueror, in the sense that the legality or illegality of the laws he imposes cannot be determined by any human court, and that no appeal to a court of law lies from his judgment. On the other hand, the practice of civilized nations has established certain rules to which officers are bound to conform in the administration of the territory

which they occupy, and those rules are called the customs or laws of war. (*M.* i. 6.)

3. The Brussels Conference of 1874 laid down :—

Art. 2. The authority of the legal power being suspended, and having actually passed into the hands of the occupier, he shall take every step in his power to re-establish and secure, as far as possible, public safety and social order.

Art. 3. With this object he will maintain the laws which were in force in the country in time of peace, and will only modify, suspend, or replace them by others if necessity obliges him to do so.

BY WHOM PROCLAIMED.

181 The proclamation of Martial Law will be made, if at all, by the commander of the forces occupying the country. It must be borne in mind, however, that such proclamation is only of the nature of a warning to the inhabitants that Martial Law exists. No proclamation is necessary to establish Martial Law, which is created by the presence of the hostile army.

1. A commander of troops in time of war, and in occupation of a foreign country, or any part thereof, acts in two absolutely distinct capacities. First, he governs his troops by military law only ; secondly, he stands temporarily in the position of Governor of the country or part of the country which he occupies. In this latter capacity he imposes such laws on the inhabitants as he thinks expedient for securing, on the one hand, the safety of his army, and on the other, the good government of the district, which, by reason of his occupation, is for the time being deprived of its ordinary rulers. (*M.* i. 5.)
2. The French official *Manual* lays down that "in all cases, to avoid uncertainty, and in the interest of the inhabitants, the invader should proclaim the fact of his occupation at all those points where he claims to exercise its rights." The proclamation to state briefly the obligations resulting from the new style of things.

MODE OF PROCLAMATION.

182 The proclamation will be in the nature of a published notice, warning the inhabitants that they are subject to Martial Law, and at the same time notifying to them the rules laid down for their obedience, and the penalties attached to their infringement.

1. It must again be noted that no proclamation is necessarily required. When a country is occupied by an invading force, Martial Law, *ipso facto*, prevails, and requires no proclamation. The presence of a hostile army proclaims its Martial Law.
2. A place or district of country occupied by an enemy stands, in consequence of the occupation, under the Martial Law of the invading or occupying army, whether any proclamation declaring Martial Law, or any public warning to the inhabitants, has been issued or not. Martial Law is the immediate and direct effect and consequence of occupation or conquest. (*American Instructions.*)
3. The French official *Manual* prescribes that the fact of the occupation, bringing with it the exercise of Martial Law, should be notified by proclamations posted in the parishes, and notices addressed to municipalities, and inserted in the local press.

JURISDICTION AS TO PLACE.

183 The power of the General commanding the occupying army extends only over the territory actually in military occupation; the test of which is exclusive possession.

MILITARY OCCUPATION.

1. A territory is considered as occupied. First, if the lawful Government, from the fact of invasion, cannot possibly exercise its authority publicly. Second, if the invader is in a position to substitute the exercise of his own authority

for that of the Government of the country. Thus, a rebellion triumphant for a moment does not suffice to interrupt the occupation of a place, if the authority of the legal Government is not effectually re-established.

2. A locality may find itself under the rule of the occupying force, although the invader has executed no act of authority. Such would occur in the case of a village surrounded by hostile forces, and having no power of resistance. (*French official "Manuel de Droit International."*)
3. An invader is said to be in military occupation of so much of a country as is wholly abandoned by the forces of the enemy. The occupation must be real, not nominal. The true test of military occupation is exclusive possession. For example, the reduction of a fortress which dominates the surrounding country gives military possession of the dominated country, but not of any other fortress which does not submit to the invader. Military occupation ceases as soon as the forces of the invader retreat or advance in such a manner as to quit their hold on the occupied territory. (*M.*)
4. The Brussels Conference of 1874 laid down that a territory is considered as occupied when it is actually placed under the authority of the hostile army. The occupation only extends to those territories where this authority is established and can be exercised. (*Art.* 1.)
5. The discussion on the subject of military occupation, mixed up as it is with that of the rights of the inhabitants of an invaded country, were long and warmly discussed at the Brussels Conference—Sir Alfred Horsfield, British delegate, thus summarized the arguments on the subject:—"The delegates of Belgium, the Netherlands, Spain, Portugal, Switzerland, and others, not only ignore, but deny, the theory that an invader has any authority in an occupied country, save what he acquires by force. They recognize no such authority *de jure*, and will not allow that the inhabitants have any duties whatever towards the invader. They, moreover, declare that for the occupation to carry with it even such authority as is derived from 'might,' such occupation must be actual and practical, and in no case constructive. As was appositely remarked by the Swedish

delegate, the analogy between occupation and blockade cannot be overlooked, a blockade existing only so long as it is effective." The opposite view was explicitly stated and ably advocated by the German delegate, General Voigts-Rhetz, who denied the analogy between blockade and occupation, the latter state of things not manifesting itself by visible signs. He, moreover, asserted that the presence of flying columns in a district was sufficient to establish occupation. (*Blue Book*, p. 61.)

JURISDICTION AS TO TIME.

184 The jurisdiction of Martial Law commences immediately that the fact of occupation is established, and only ceases either when the occupation ceases, or by special proclamation to that effect by the General commanding the occupying force.

1. Martial Law does not cease during the hostile occupation, except by special proclamation ordered by the Commander-in-Chief, or by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same. (*American Instructions.*)

JURISDICTION AS TO PERSONS.

185 The rule of military occupation has relation only to the inhabitants of the invaded country; the troops and camp-followers in a foreign country occupied by an English army remain under English Military Law, and are in no respects amenable to the rule of military occupation. (*M.* xiv. 46.)

1. It will be seen by reference to the Chapter on the Summary Use of Military Force in case of Emergency, that cases may occur in which the commander of an army may use summary power of punishment on his own responsibility on persons whether subject to Military Law or not, should the safety of the army or other great necessity call for it.

2. Martial Law extends to property, and to persons, whether they are subjects of the enemy or aliens to that Government. Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to Martial Law in cases of urgent necessity only; their property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint. (*American Instructions*, Arts. vii., viii.)
3. This instruction as to consuls may be correct, strictly speaking, but any interference with consuls or persons representing in any way foreign nations, would be most foolish, and only excusable in the last necessity. In the most extreme case mere removal from the territory should suffice.

AUTHORITY TO EXECUTE.

186 The General commanding the occupying army will lay down what authorities are to carry out his instructions for the government of the occupied territory. These authorities may either be the ordinary administrative officers of the occupied territory acting under the orders of the General, or such officers and others as may be appointed by him. All is at the discretion of the Commander-in-Chief.

1. The Commander of the Forces may proclaim that the administration of all civil and penal law shall continue, either wholly or in part, as in times of peace, unless otherwise ordered by the military authority. (*American Instructions.*)
2. The French *Manual* says that the magistrates and other civil officers of the country should act as their conscience guides them for the best interests of their country, which would suffer by a sudden stoppage of administration. Municipal functionaries will almost always consider it a patriotic duty to remain at their posts, but they must not act spontaneously as the agents of the invader. The invader

will generally make every effort to obtain the assistance of the local officials, if it is only to maintain order and social life.

3. The trial and punishment of the guilty parties may be left to the ordinary courts and authorities of the country, or they may be referred to special tribunals organized for that purpose by the government of military occupation; and where they are so referred to special tribunals, the ordinary jurisdiction is to be considered as suspended *quoad hoc.* (*Halleck*, ii. 453.)

4. The Brussels Conference laid down:—

Art. 4. The functionaries and officials of every class who at the instance of the occupier consent to continue to perform their duties, shall be under his protection. They shall not be dismissed, or be liable to summary punishment, unless they fail in fulfilling the obligations they have undertaken, and shall be handed over to justice only if they violate those obligations by unfaithfulness.

NATURE OF RULE.

187 The nature of the rule under Martial Law should be laid down by the General proclaiming it. This was stated by the Duke of Wellington in speaking in the House of Lords in 1850 on the Ceylon Case, as follows:—"The General who declared Martial Law, and commanded that it should be carried into execution, was bound to lay down distinctly the rules and regulations and limits according to which his will was to be carried out." (*Clode, M. F.*, ii. 502.)

As far as possible it is preferable to allow the jurisdiction of the ordinary law of the country to continue, of course under the direction and control of the General commanding.

1. The Duke of Wellington thus described his conduct under these circumstances:—"He declared that the country should be governed according to its own national laws, and he carried into execution that will. He governed the country

strictly by the laws of the country; and he governed it with such moderation, he must say, that political servants and Judges who at first had fled or had been expelled, afterwards consented to act under his direction." (*Clode, M. F.*, ii. 502.)

2. As Martial Law is exercised by military force, it is incumbent on those who administer it to be strictly guided by the principles of justice, honour, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed. (*American Instructions.*)
3. When the Germans were occupying Versailles, no person could go in or out of that town without a permit from the German military authorities. The French Mayor continued his civil duties, and the French flag remained over the *Mairie* all the time.
4. The regulations issued by the Germans as to the conduct of the inhabitants of the districts of France occupied by them during the war of 1870-1, were generally to the following effect:—To put out their lights at a certain hour, and, in case of a disturbance at night, to show lights in all their windows; to hold no communications with the enemy, or with any person in the unoccupied part of the country; not to act voluntarily as guides to the enemy; if called on to act as guides to the occupying troops, not to mislead them at their peril; not to join the hostile army, nor to form bands on their own account; not to cut the telegraph or injure the railway under the penalty of death on discovery; if the railway or telegraph was injured and the offender could not be discovered, a fine was imposed on the town or commune; if the fine or usual money contribution was not forthcoming, hostages were taken and detained until it was paid; townspeople to remain tranquil, as well as all in the neighbourhood; to furnish the requisition demanded from them, and to help the local authorities to pay the money contributions. On these conditions their lives and persons were to be safe, and their property protected. (*Halleck*, ii. 452 *n.*)

COURTS TO ADMINISTER.

188 The nature of the courts to administer the rule of military occupation is at the discretion of the General in command. He may create special tribunals, or leave the native tribunals to exercise their usual jurisdiction. (*M.* xiv. 46.)

The special tribunals created by an invader for carrying into effect the rule of military occupation in the case of individual offenders, are generally military courts framed on the model and carrying on their proceedings after the manner of courts-martial. (*M.*)

1. Courts so established by an English General would not be courts-martial within the meaning of the Army Act, but courts established, and regulated, only by the will of the General. (*M.*)
2. Where possible, the ordinary tribunals of the country may continue their functions under the direction of the General commanding.
3. The Duke of Wellington spoke thus of his arrangements under such circumstances :—" The Judges sat in the courts of law conducting their judicial business, and administering the law under his direction." (*Clode, M. F.*, ii. 502.)
4. As a general rule, the rule of military occupation extends only to such matters as concern the safety of the army, the invader permitting the ordinary civil tribunals of the country to deal with ordinary crimes committed by the inhabitants. (*M.* xiv. 46.)
5. Whenever feasible, Martial Law is carried out, in cases relating to individuals, by military courts. Courts to try cases which do not come under Military Law are called in the armies of the United States, " Military Commissions." These courts try and punish offences under the common law of war. (*American Instructions.*)

NATURE OF PUNISHMENT.

189 The nature of punishment will be such as is necessary, in the first place, for the safety of the army, and secondly, for the security of the inhabitants; it will consequently vary with place and circumstances. "Martial Law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected, and must be prepared for. Its most complete sway is allowed —even in the Commander's own country—when face to face with the enemy, because of the absolute necessities of the case." (*American Instructions.*) The punishments must in all cases be such as are in accordance with the laws and custom of war. (For *Custom of War* see end of book.)

1. The most important power exercised by the invader occupying a territory is that of punishing, in such manner as he thinks expedient, inhabitants guilty of breaking the rules laid down by him for securing the safety of the army. The right to inflict such punishment in case of necessity is undoubted; but the interests of the invader, no less than the dictates of humanity, demand that inhabitants who have been guilty of an act which is only a crime in consequence of its being injurious to the enemy, should be treated with the greatest leniency consistent with the safety and well-being of the invading army. (*M.*)
2. The *American Instructions* for Martial Law in a hostile country lay down that sentences of death passed by military courts acting under such Martial Law, shall be executed only with the approval of the Chief Executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the Chief Commander.

RESPONSIBILITY FOR MARTIAL LAW.

190 The General enforcing Martial Law in foreign territory under military occupation, is responsible only to his own Government, and not to the invaded people. (*M.* xiv. 45.)

1. The legality or illegality of the laws imposed by the commander of an army occupying a foreign country on the inhabitants cannot be determined by any human court, and no appeal to a court of law lies from his judgment. (*M.* i. 6.)

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THE LAWS

OR

CUSTOM OF WAR.

"A soldier should fear nothing but God and dishonour.

THE LAWS OR CUSTOM OF WAR.

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INTRODUCTION.

1 INTERNATIONAL LAW is defined to be the rules of conduct regulating the intercourse of States.

The Laws or Custom of War, is that branch of Inter, national Law which regulates the intercourse of States during war; war being itself defined as an armed contest between States or part of States.

1. In the *Manual of Military Law*, i. 7, Sir Henry Thring objects to the term "Laws of War" on the ground that the usages known under this name do not admit of precise definition, and suggests that "Customs of War" should be used instead. This objection would appear equally valid against the use of the term "International Law," as well as many other ordinary uses of the word "Law." On the other hand, "Customs" hardly suggests anything so definite as many of the rules laid down for the conduct of war. The Law of War, in common with that "International Law" of which it forms a part, appears rather to be a law in process of development, destined to become better defined and to be accompanied by penalties more surely inflicted, as civilization spreads and the public opinion of the world becomes more powerful. It must further be remembered that the term "Laws of War" has been long in use, has become firmly embodied in our literature as well as in that of our Colonies and of the United States, and therefore cannot easily be dropped.
2. The necessity for having the Custom of War regulated by international agreement was thus described by Baron Jomini, president and first Russian delegate at the Brussels Conference of 1874:—"War interrupts economical relations-

gives rise to the apprehension that other wars may follow, rendering the maintenance of costly armies necessary. It is, therefore, highly desirable that its course and extent should be regulated. This is of as much importance to private individuals as to governments, to the military element as to populations. It is necessary that all these ideas should insensibly penetrate all grades of the military hierarchy, and even the masses. The most contradictory ideas, in fact, exist with regard to war. Some would make it more terrible, in order that it might be more rare; others would make of it a tournament between regular armies, with the people for simple spectators. It is necessary that we should know exactly how the case stands in this respect. We must first of all take up a practical standing-point, and admit that as war cannot be abolished, it will be advisable to regulate it as far as possible. It is less difficult to perform one's duty than to understand it thoroughly. What is required is, that we should let every one know what his duty is." (*Blue Book*, p. 203.)

2 The Laws of War have gradually been brought to their present state of development by the usage of nations during wars in the past, and the agreements and compacts entered into between them from time to time.

3 When the great Civil War between North and South broke out in America, *Instructions for the Government of the Armies of the United States in the field*, were issued by the Government at Washington in April, 1863. These had been prepared by Dr. Lieber, revised by a Board of Officers, and approved by the President of the United States.

These instructions are of great value as having necessarily been prepared with great care, and as having been practically carried out during one of the greatest contests of modern times.

1. During the sitting of the Brussels Conference of 1874, Baron Jomini, Russian first delegate and president, pointed

out that the idea of the Project of Convention was suggested by what took place in the United States during the War of Secession; the rules of President Lincoln to alleviate the miseries of war being yet fresh in the memory of all. (*Blue Book*, p. 203.)

4 In 1864 a Convention was signed at Geneva, which has since been acceded to by all the European Powers, laying down rules for the treatment of the sick and wounded, and those who tend them in time of war. In 1868 additional articles were added, which also have since been acceded to by all the European Powers.

5 On the 11th December, 1868, the Powers of Europe, by a declaration signed at St. Petersburg, engaged to forbid the use by their armed forces of explosive projectiles below a weight of 400 grammes (14 oz.).

6 An International Conference was held at Brussels in 1874, to endeavour to lay down rules for the conduct of war; but it was not greatly successful in so doing. Suspicion arose that the Conference was to be made the means of hampering the action of England as a naval power, and of laying down laws unduly favourable to the Great Powers having large armies constantly prepared for war and systems of compulsory military service. No delegate was sent from the United States; the British delegate was sent on the understanding that the subject of maritime operations should be barred from discussion; and great difference of opinion appeared on the subjects of the military occupation of territory, and the rights of an invaded people as against those of an invading army.

The only subjects on which the conference came to an agreement were those on "the means of injuring the enemy," "sieges and bombardments," "spies," "prisoners of

war," "bearers of flags of truce," "capitulations," "sick and wounded," "armistices," "belligerents interned," and "wounded in neutral territory."

1. The following notes on the Laws of War as applicable to military operations, are based on the above authorities, and also largely on the work on International Law by General Halleck of the United States, a writer, who, educated at West Point, served in the United States army until his retirement in 1854, when he became the leading member of a firm of lawyers in San Francisco. His career in the army had given him a reputation as a soldier well versed in military art and science, in which branch of knowledge he was for some time a lecturer. On the outbreak of war in 1864 he was given a command, and from July 1862 until 1864 was General-in-Chief of the armies of the United States; from 1864 he was Chief of the Staff of the War Department at Washington until April 1865, when he was again given a military command. He was Commander of the military division of the South at his death in 1872, at the age of 55. His work on International Law is worthy of his great reputation, and of the great opportunities he enjoyed for seeing the practical operation of the laws of war during the Great Rebellion. The edition used in the present work is that revised by Sir Sherston Baker, Bart., Barrister-at-law, published in 1878.
2. The short summary of the Laws or Customs of War, included in the *Manual of Military Law*, issued by authority, and written by Sir Henry Thring, has been quoted to a considerable extent. The French *Manuel de Droit International a l'usage des Officiers de l'Armée de Terre*, of 1884, has also been referred to, as well as various other works.

CHAPTER I.

THE OUTBREAK OF WAR.

THE RIGHT OF MAKING WAR.

7 THE right of making war belongs in every civilized nation to the supreme power of the State. In England and other monarchical governments of Europe this power is vested in the Crown; in the United States in the Federal Legislature.

1. The Congress of Paris, in 1856, laid it down as a desirable thing, that before appealing to the force of arms, the conflicting States should have recourse to the mediation of disinterested Powers.

NECESSITY OF A DECLARATION OF WAR.

8 In order to make a war completely effectual, it is necessary in England that it be publicly declared and duly proclaimed by the King's authority. This is usually done by posting a proclamation in the City of London. (*Blackstone, Com.* i.)

In modern times, the practice of a formal declaration to the enemy has fallen into entire disuse, the belligerents limiting themselves to a public declaration within their own territories and to their own people. There is nothing in international jurisprudence, as now practised, to render a formal declaration to the enemy obligatory, and the present usage entirely

dispenses with it. All, however, agree that there should be some manifesto, declaration, or publication made within the territory of the State which declares the war, announcing the existence of hostilities; and such manifesto or publication usually sets forth the motives for commencing the war. Some such formal act, proceeding from the competent authority, seems necessary, in order to announce the war to the people at home, and to apprize neutral nations of it, for their instruction and direction in respect to their intercourse with the enemy.

There are a number of instances in modern times, where wars between the most civilized nations have been commenced and carried on without a formal declaration of any kind. (*Halleck*, i. 477-8.)

1. On the outbreak of war with Russia in 1854, the declaration of war by Her Majesty, which was a lengthy document giving the history of the cause of dispute and the previous negotiations, was read by the proper officers from the steps of the Royal Exchange, in the city of London, on the 31st March.
2. Among the ancients a declaration of war was considered essential. Polybius informs us, that the Ætolians were regarded as the common outlaws of Greece, because they did not scruple to make war without declaring it. Invasions of that sort were regarded as robberies, not as lawful wars. In the Middle Ages, the declaration of war appears to have meant simply a challenge, or defiance, like that then and afterwards customary in a duel. It appears to have originated out of habits that governed the relations between the feudal barons. During this period, bishops, who were often also warriors, were frequently bearers of declarations of war. Thus, the Bishop of Lincoln bore the challenge of Edward III. and his allies to Charles V. at Paris. The first precedent for dispensing with declarations of war appears to have been set by Gustavus Adolphus. (*Farrer*, pp. 19, 198.)

GENERAL EFFECT OF THE COMMENCEMENT OF A STATE OF WAR.

9 A war duly declared, or officially recognized, is not merely a contest between the Governments of the hostile States in their political character or capacity; on the contrary, its first effect is to place every individual of the one State in legal hostility to every individual of which the other is composed, and these individuals retain the legal character of enemies, in whatever country they may be found.

In the next place, all the property of the one State, and of each of its citizens, is deemed hostile with respect to the opposing belligerent.

A declaration or recognition of war effects an absolute interruption and interdiction of all commercial intercourse and dealings between the subjects of the two countries. There cannot exist, at the same time, a war of arms and a peace of commerce. (*Halleck.*)

1. This doctrine renders null and void all contracts with the enemy during the war; it makes illegal the insurance of enemy's property; prohibits the drawing of bills of exchange by an alien enemy on a subject of the adverse Government; the purchase of bills in the enemy's country, or the remission and deposit of funds there, and the remission of money or bills to subjects of the enemy.
2. All endeavours to trade with the enemy by the intervention of third persons, or by partnership, are equally forbidden; and no artifice can legalize any trade, communication, or contract of whatsoever character, without the express permission of the Government. All commercial partnerships existing between the subjects of the two parties prior to the war, are dissolved by the mere force and act of the war itself; though other contracts, existing prior to the war, are not extinguished; but the remedy is only suspended by the inability of the alien enemy to sue.
3. At the outbreak of the Crimean War in 1854, it was

enacted (17 and 18 Vict. c. 123), that any person in the British dominions, or British subject elsewhere, who should become interested in Russian Government securities of any sort issued since the outbreak of war on the 29th March, 1854, should be guilty of a misdemeanour. This did not apply to the case of a claim on the estate of a deceased person, nor to an execution for debt, nor to an interest in a bankrupt estate, nor to Russian Government notes used in circulation. (*Halleck*, i. 482.)

DETENTION OF ENEMIES ON THE OUTBREAK OF WAR.

10 On the outbreak of war, all the subjects of one of the hostile powers within the territory of the other are liable to be seized and retained as prisoners of war; such detention, however, is contrary to modern practice.

1. At the outbreak of war with France in 1803, Napoleon, to retaliate for the seizure of ships by Britain, is said to have seized 10,000 English subjects resident in France, and to have retained them in prison until 1814; but in recent wars this precedent has not been followed.
2. During the Russian war in 1854-6, Russians were allowed to reside peaceably in England and France; in 1870, however, Germans were ordered off the soil of France within a few days after notice was given to them.
3. In England it was provided by *Magna Charta* that upon outbreak of war, foreign merchants in England, subjects of the hostile State, were to be attached "without harm to body or goods," until it was known how English merchants were treated by the enemy. This rule seems to have prevailed among all the northern nations. By the Statute of Edward III. c. 17, foreigners were to have convenient warning of 40 days by proclamation, to depart the realm with their goods. By the United States Act of Congress of 1798, such reasonable time as might be consistent with the public safety, and according to the dictates of humanity and national hospitality, "for the recovery, disposal, and removal of their goods and effects, and for their departure," was to be allowed.

4. Other nations have made similar rules; but although the milder rule is preferred by modern opinion, the ancient and stricter rule rendering them liable to seizure and imprisonment is still the law of nations. (*Halleck*, i. 485.)

SEIZURE OF GOODS ON OUTBREAK OF WAR.

11 As regards the goods belonging to subjects of a hostile nation, the modern usage is to allow disposal of the same by the owners thereof, or that they be left and claimed by the owners on restoration of peace.

1. It has now become an established though not inflexible rule of international law, that property of subjects of a hostile nation is not liable to confiscation; this rule, however, is not immutable, and depends on political considerations, which may continually vary.
2. At the outbreak of the Crimean War in 1854, Russian ships in French and English ports were allowed six weeks to quit the ports of France and England.

CHAPTER II.

THE MEANS BY WHICH WAR MAY BE PROSECUTED.

GENERAL RULE.

12 The general rule is, that in carrying on a war, no greater harm shall be done to the enemy than necessity requires for the purpose of bringing him to terms. This principle excludes gratuitous barbarities and every description of cruelty and insult that serves only to exasperate the sufferings, or to increase the hatred, of the enemy, without weakening his strength or tending to procure his submission. War is not like a duel, where equality of arms is prescribed; each combatant makes use of the most perfect weapon he can get, and his enemy cannot complain if he is less well provided.

MEANS PROHIBITED.

13 The following are among the measures the use of which are prohibited by the Laws of War:—The poisoning of water or food. The use of poisoned weapons, or of weapons producing unnecessary pain or injury. By the declaration of St. Petersburg of December 11th, 1868, the latter includes the use of any explosive projectile of a weight below 400 grammes, a little over 14 oz. The propagation of contagious disease in the enemy's army or country.

14 Any other means or instruments of destruction are legitimate, including the cutting off of water supplies, and the mixing with water of substances which evidently make it undrinkable. The use of mineral oils as a means of destruction is permissible, but they cannot be used for acts of vengeance or intimidation. (*French Manual*, p. 13.)

15 The deception of the enemy by perfidious means is absolutely prohibited by the Laws of War. The deceptive use of a flag of truce, or of the red cross or flag of Geneva, in order to obtain protection from the enemy's attacks under false pretences, is dishonourable, and contrary to the Laws of War. These are sacred emblems, which both parties are bound to respect.

1. The *French Manual* of 1884 (p. 11) lays down, however, that it is permitted by the Custom of War that the flags, uniforms, sounds, or signals of the enemy may be used before the fight, as a *ruse* by which the enemy may be approached or drawn into an ambuscade.
2. The *American Instructions* of 1863, on the other hand, state :—

   "*Art.* 63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.
3. "*Art.* 16. Military necessity does not admit of cruelty, that is, the infliction of suffering for the sake of suffering, or for revenge, nor of maiming or wounding except in fighting, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy ; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.
4. "*Art.* 70. The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war."

5. The *French Manual* of 1884 says :—"The use of arms, projectiles, or substances which cause needless suffering, are forbidden as barbarous. By this rule combatants abstain from using as projectiles, broken glass, roughened bullets, slugs, small shot, barbed arrows, balls containing glass or lime, and in general every means, which, without exercising a direct influence on the issue of the fight, has only the effect of producing more grievous wounds. This rule applies more specially to organized combatants who are furnished with regular arms and ammunition; no one would think of blaming improvised combatants, who, in default of bullets and bayonets, should load their guns with small shot, or improvise an arm from the first tool which comes to hand."

6. According to the stipulations of the Brussels Conference of 1874, *Arts.* 12 and 13, the following means of injuring the enemy are strictly forbidden :—

(*a*) The use of poison or poisonous weapons; (*b*) Murder by treachery of individuals belonging to the hostile nation or army; (*c*) Murder of an antagonist, who, having laid down his arms, or having no longer the means of defending himself, has surrendered at discretion; (*d*) The declaration that no quarter will be given; (*e*) The use of arms, projectiles, or substances which may cause unnecessary suffering, as well as the use of projectiles prohibited by the declaration of St. Petersburg in 1868; (*f*) Abuse of the flag of truce, the national flag, or the military insignia or uniform of the enemy, as well as the distinctive badges of the Geneva Convention; (*g*) All destruction or seizure of the property of the enemy which is not imperatively required by the necessity of war.

7. It was proposed by the Swedish Delegate at the Conference that the use of soft lead in small-arm ammunition should be prohibited as unnecessarily aggravating pain, but this was objected to as impracticable on the score of expense. It appears that bullets of soft lead are used by all the Continental Powers.

8. Feints and deceptions are always allowable in war. It is the breach of good faith, express or implied, which

constitutes the perfidy, and gives to such acts the character of *lies*. See "Stratagems," and "Deceitful Intelligence."

SIEGES.

16 A siege is the military investment of a place in such manner as to intercept, or render dangerous, all communications between the occupants and persons without the lines of the besieging army; its object being to bring the place by capitulation, or by other means, into the possession of the besiegers. Every besieged place is, for the time, a military post; for even when it is not defended by a military garrison, its inhabitants are converted into soldiers by the necessity for self-defence. (See also "Bombardment," § 17, &c.)

1. The Brussels Conference of 1874 directs that fortified places are alone liable to be besieged. Towns, agglomerations of houses, or villages, which are open or undefended, cannot be attacked or bombarded. (*Art.* 15.)
2. But if a town or fortress, agglomeration of houses, or village, be defended, the commander of the attacking forces should, before commencing a bombardment, and except in the case of surprise, (*l'attaque de vive force,*) do all in his power to warn the authorities. (*Art.* 16.)
3. Under similar circumstances, all necessary steps should be taken to spare, as far as possible, buildings devoted to religion, arts, sciences, and charity, hospitals, and places where sick and wounded are collected, on the condition that they are not used at the same time for military purposes. It is the duty of the besieged to indicate these buildings by special visible signs, to be notified beforehand by the besieged. (*Art.* 17.)
4. At the Brussels Conference the Netherlands' delegate, M. de Lansberge, was instructed by his Government to request the insertion of a clause to the effect that "a town not possessing an *enceinte*, but surrounded by detached forts, shall be considered an open town. on condition that it

does not contain troops, and that its inhabitants do not co-operate in the defence of the forts." General Voigts-Rhetz, the first German delegate, stated that open places within the radius of the forts must be considered as fortified places. After a discussion, the Conference decided that the proposal of Baron Jomini, the Russian first delegate and president, should be inserted in the Protocol, to the effect that every open town which is situated near a fortress, and co-operates in its defence, is subject to be treated as a fortified place. That if it does not co-operate in the defence it cannot be attacked or bombarded. (*Blue Book*, p. 196.)

BOMBARDMENT.

17 In the attack of a place in the possession of the enemy a belligerent can have recourse to bombardment, or to any other siege operation necessary to overcome the resistance offered.

18 The Laws of War do not oblige the assailant to give previous warning of the bombardment of a besieged place, but humanity dictates that this should be done where there are no weighty reasons against it. Should the besieger intend to carry the place by surprise he will not give notice, as doing so would put the besieged on their guard. He may also hope that by an unforeseen bombardment he may increase the demoralization already existing in the place, and thus hasten its capitulation.

1. Although nothing was laid down by the Brussels Conference on this subject, Sir Alfred Horsford reported that it was understood to be the feeling of the meeting that when once a besieger has given to the non-combatants an opportunity of leaving the place, he has done all that is required by military precedent. (*Blue Book*, p. 13.)

19 The bombardment is, in general, directed against the ramparts and other works of defence, in order to destroy them, render them untenable, and facilitate the assault.

The question whether a besieger is justified in bombarding the interior of a town has been much disputed and discussed; as a fact there can be no doubt that the laws of war authorize it; but it should not be done without strong reasons for it, and when carried out it should be with all the discretion possible. This discretion will take the form principally of taking measures to spare buildings consecrated to science, art, education, and charity, as well as the hospitals and ambulances. As it is often difficult at a distance to distinguish these privileged buildings, it is the duty of the besieged to mark their positions distinctly. Hospitals and ambulances will be shown by the red cross flag, but the Geneva Convention lays down strictly that this flag must be used nowhere else.

Buildings for which inviolability is claimed must not be put to any use accessory to military purposes, whether as offices, barracks, signal-stations, or observatories.

1. The *French Manual* of 1884, from which the above is mainly taken, says :—" In all times publicists have struggled to have it acknowledged that belligerents, in case of bombardment, should be obliged to direct their fire exclusively on the works of defence; they have pointed out how immoral and inhuman it is to cast death and ruin in the midst of an inoffensive population; they have cited examples to show that the effect produced by such proceedings is not what is expected, but that, far from being cast down by it, the constancy of the inhabitants is raised by these perils. Military men are, however, not convinced by these arguments; they consider that when shut up in a besieged place, the civil population assists in the defence, and that by fire, fear, and ruin, they may be demoralized and made an unconscious assistance in hastening the capitulation."
2. In 1870, the Germans, wishing to hasten the surrender of

the place, tried the plan of "simple bombardment" on Strasburg, a rich and populous city, with a weak garrison, in the hope that doing so might force the inhabitants to induce the commandant to surrender. The bombardment was kept up relentlessly for two days, during which time the famous library, picture gallery, and other public buildings were destroyed. The roof of the cathedral was burnt, and the cross on the tower struck with a shell. As this bombardment did not have the expected result, regular siege operations were commenced, and after this the town was spared as much as possible; but on the French establishing an observatory on one of the towers of the cathedral, the tower was shelled by the Germans. (*Halleck*, ii. 108 *n.*)

3. Paris was also bombarded from the south side, where the closeness of the circle of forts permitted it. The bombardment of Metz was impracticable, owing to the distance of the forts from the city; but as a rule other fortified towns were reduced by the Germans by the bombardment, not of the fortifications, but of the towns themselves.
4. French writers before the war had declared that it would be the duty of French commanders to bombard the civil and commercial quarters of the fortified towns, and the French themselves followed the examples by bombarding Paris during the Commune. (*Edwards — Germans in France.*)
5. General Ambert points out, that during the war of 1870-1, the Germans, in their sieges, employed regular siege operations only at Strasburg and Belfort; elsewhere they had recourse to blockade and bombardment. Bombardment did not succeed at Bitche, Paris, Phalsbourg, and Belfort. At Strasbourg and Toul the bombardment of the towns was useless; he considers the end would have been more quickly attained by directing the fire on the defenders. General Ambert says, "To spread terror, the Prussians directed their fire on monuments, houses, public buildings, and hospitals."
6. The number of men killed by bombardment has been greatly exaggerated. The bombardment of Strasburg lasted 38 days, killed 300, and wounded 800; Bitche, 14 days,

with eight killed and seven wounded; Toul, 26 days, with 18 killed and six wounded; Verdun, five days, with 17 killed and 22 wounded; Soissons, four days, with 17 killed; la Fère, four-and-a-half days, with one killed and four wounded; Shelestadt, six days, with 12 killed; Neufbrisach and Fort Mortier, nine days, with one killed; Thionville, two-and-a-half days, with two killed; Montmédy, three days, with one killed; Mézières, three days, with 53 killed and 100 wounded; Rocroy, one-and-a-half days, with none killed or wounded; Longwy, eight days, with none killed or wounded; Péronne, nine days, with four killed and 15 wounded; Belfort, 73 days, with 60 killed; the interior of Paris, 23 days, with 107 inhabitants killed, 289 wounded; . . . Fort St. Denis, six days, with 22 inhabitants killed and 80 inhabitants wounded. The total result of the bombardments by the Germans for a total of 401 days, was 721 men killed; not two men a day, although the shelter available was everywhere insufficient. Except at Strasburg and Mézières, the daily loss was very small." (*Histoire de la Guerre*, 1870-1, p. 293.)

7. General Ambert quotes Von Moltke as follows on the subject:—"A certainly cruel means of obtaining the surrender of a place . . . . is to bombard not only the fortifications, but also the town itself. We have employed it during the war, which has caused us to be accused of violating the laws of humanity; nevertheless, we were right. The duty of a commander is to spare, as much as possible, the blood of his soldiers. Very well; placed between the alternatives of sacrificing, either in delivering an assault or in a prolonged siege, the existence of perhaps a thousand men, and destroying a hundred houses; we have had no hesitation. In acting thus, we have obeyed the true feelings of humanity." (*Ibid.* p. 288.)
8. General Ambert writes himself on this:—"Whatever may be said, bombardment is against the right of war and the right of peoples. This right of war can never go so far as to extinguish that of those who are not soldiers. Before Europe and before history, the chiefs of the German armies will have to answer for their outrages. Vainly will they plead that their men mistook their orders." (*Ibid.* p. 552.)

9. On the other hand, the distinguished French architect, M. Viollet-le-Duc, regards this burning question more philosophically. He remarks as follows :—"The destructive power of explosive projectiles puts obstacles in the way of the besiegers' approaches; and in fact, during the late war, we never saw employed that old mode of approach with a view to attacking by breach and crossing the ditch. The Germans were not so stupid as to employ these classical methods. They took up their position on favourable and often commanding points, at 3800 to 4200 yards around our fortresses, which adhered to the old defensive system adapted to ranges of 2200 yards at most; and covered with shells our works and the towns they were supposed to protect without risk to a single sapper. We thought that odious and unreasonable, like those nobles of the 15th century who thought it an abominable shame that their feudal nests should be breached with bombards, and declared that the trade of war was thereby damaged." (*Annals of a Fortress*, p. 370.)

10. The Duke of Wellington, defending himself against the charge of allowing the town of St. Sebastian to be destroyed, when writing to Sir H. Wellesley on October 9th, 1813, observes :—"Everything was done that it was in my power to suggest to save the town. Several persons urged me in the strongest manner to allow it to be bombarded, as the most certain mode of forcing the enemy to give it up. This I positively would not allow, for the same reasons as I did not allow Ciudad Rodrigo or Badajoz to be bombarded; and yet if I had harboured so infamous a wish as to destroy this town from motives of commercial revenge, or any other, I could not have adopted a more certain method than to allow it to be bombarded." (*Select Despatch*, 836.)

11. During the sittings of the Brussels Conference the inhabitants of Antwerp presented a petition to the Belgian Government praying that it should be admitted as a principle of humanity that the inhabited quarters of even fortified towns shall not be bombarded. This was submitted to the Conference by Baron Lambermonrt, the Belgian delegate, and supported by the delegate from the

Netherlands. The German delegate, General Voigts-Rhetz, demanded that it should be recorded in the Protocol that bombardment, being one of the most efficacious means of obtaining the object of war, it is impossible to yield to the wishes of the petitioners. (*Blue Book*, p. 196.)

STARVATION BY INVESTMENT.

20 Among the means of warfare permitted by the laws of war is the bringing of the enemy to terms by starvation, either by investment, destruction of his communications, or other means. In the case of a siege or investment this will extend even to the unarmed population.

1. The *American Instructions* state :—
   "*Art.* 17. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.
   "*Art.* 18. When the commander of a besieged place expels the non-combatants in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender."
2. The *French Manual* of 1884 says :—"The besieger is not obliged to allow the non-combatant population to leave, should the military authorities of the place wish to expel them, whether in order to get rid of a cause of incumbrance and demoralization, or of useless mouths. However, he will do well to consent, if the operation of the siege will not suffer from it." The commandant of the place, on the other hand, is bound to keep in the *enceinte*, and to support, the civil population to whom a passage is refused by the enemy.
3. At the siege of Strasburg, at the request of a deputation of Swiss delegates, General Von Werder, who commanded the besieging force, allowed 1400 aged men, women, and children to leave the place for Switzerland, where they were hospitably received.
4. At the Brussels Conference, the second delegate for Italy,

Colonel Count Lanza, proposed that should the defender of a fortified place turn out the inhabitants in order to husband his resources with the view of prolonging the defence, a measure which might be justified by military requirements ; the besieger may, without violating the Laws of War, refuse a free exit to such inhabitants, and that in such a case, the besieged shall be obliged to allow them to re-enter the place. (*Blue-Book*, p. 196.)

This proposition was supported by the first delegate of Germany, General von Voigts-Rhetz, who wished for the insertion of a clause stating that, as soon as an investment is completed, the besieger shall not be bound to consent to the departure of the inhabitants from the besieged place. It might in fact happen that the commandant of a besieged place, either to husband his resources, or to hamper the movements of the besieger, might turn out the inoffensive inhabitants, consisting of women, children, the aged, and the infirm. The position of these unfortunate people would be cruel if the besieger refused to receive them, which, unless he did not wish to help the tactics of his adversary, he would be bound to do.

On the remark of the French delegate that such a case is improbable, the proposition was withdrawn, it being understood that the remarks made could be inserted in the Protocol. (*Blue Book*, p. 199.)

5. The duty of the commander of a place likely to be besieged is laid down as follows by Lieut.-Colonel Prevost, who advocates, and rightly, that where a place is subject to bombardment by reason of its imperfect defences, it is the duty of the commandant to cause all the women, children, and old men to leave it before it is besieged ; arrangements, of course, being made for giving them a Government allowance of money to support themselves elsewhere. By this means the hands of the commandant will be free to carry on his defence to the utmost. (*Lieut.-Colonel Prevost*, 42.)

USE OF BARBARIAN TROOPS.

21 The employment of barbarian troops in a war between civilized nations is still tolerated ; due precautions should be

taken, however, by those employing them, that such troops in no way outrage the laws of war.

This question especially affects Great Britain and Russia, both of which have large numbers of uncivilized races beneath their sway.

1. Russia brought Circassians into Hungary in 1848, and towards the end of the Crimean War (1855), she was preparing to arm some savage races within the Empire. The French employed savages against the British in America, and the British did the same against their revolted colonists; the French Government employed the Turcos against the Austrians in 1859, and against the Germans in 1870. Turkey employed Circassians and Bashi-Bazouks against the Servians in 1876, and against the Russians in 1877-8.
2. In a war of a civilized race against savages or uncivilized races, the employment of combatants equally savage is usual, and in fact almost invariable. The civilized belligerent must in such case be held responsible that his allies do not disgrace his cause by committing acts contrary to the extreme rights of war. In such a case, if prisoners of war are given up to uncivilized allies, care should be taken that they are not treated with barbarity. In the present day the public opinion of Christendom will certainly attach a stigma to the committal of barbarities by uncivilized allies, if permitted or winked at by a civilized country.

ASSASSINATION.

22 Assassination, or treacherously taking the life of an enemy, is condemned by all civilized nations; all authorities agree, that any State or General, who should resort to this means of getting rid of an opponent, should be regarded as an enemy to the human race, and be excluded from civilized society.

Halleck writes:—"Such an act is now deemed infamous and execrable, both in him who executes, and in him who commands, encourages, or rewards it."

History, however, relates many instances in which the assassination of the Sovereigns or Generals of a hostile State has been carried out or attempted. The assassination of William, Prince of Orange, in 1584, by the Spaniards, during the War of the Netherlands, being a case in point; Philip II. having previously offered a reward for his head.

1. In 1806, a foreigner waited on Mr. Fox, then Secretary of State, and made an offer to assassinate Bonaparte, if it met with the approbation of the English Ministry. Mr. Fox had the man secured and sent out of the kingdom as far as possible from France, at the same time informing M. Talleyrand, the French Minister for Foreign Affairs.
2. The *American Instructions* of 1863 state:—

"*Art.* 148. The Law of War does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile Government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation made, by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies, as relapses into barbarism."

23 The practice of offering a reward for an individual enemy, living or dead, appears to be little, if at all, removed in principle from the direct encouragement of assassination, and should be equally reprobated as disgraceful.

1. The *French Manual* of 1884 points out, p. 11:—"The laws of humanity do not tolerate getting rid of an enemy by approaching him under false pretences with a view to take his life, still less does it permit his assassination to be provoked by gifts or promises to traitors. It equally forbids his proclamation as out of the pale of law, and authorizing the first-comer to fall upon and kill him."

RETALIATION.

24 The right of retaliation is one which cannot be entirely dispensed with, but is an extreme measure only to be resorted to in the last necessity. Reprisals are sometimes the only means of enforcing the Laws of War, and on this account they are tolerated. They are themselves, however, a violation of this law, and therefore should only be resorted to from necessity, and their exercise should be restrained to the measures strictly necessary for the end to be gained. If this rule is neglected, and reprisals are made which are unjustifiable in the eyes of the enemy, he will reply with reprisals still more severe, and there will be danger of the war becoming more and more barbarous. (*French Manual*, p. 26.)

1. The *American Regulations* lay down on this subject :—
   "*Art.* 27. The Law of War can no more wholly dispense with retaliations than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.
2. "*Art.* 28. Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and, moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution. Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of a regular war, and by rapid steps leads them nearer to the internecine wars of savages."
3. The *French Manual* says, p. 25 :—"A belligerent is not freed from obeying the Laws of War, because his adversaries have violated certain points of them. On the contrary, it is by the scrupulous observation of his own duties in this respect that he will succeed most surely in maintaining, or

restoring, the enemy to the rules of honourable warfare. It is only when the facts have been duly stated, and the satisfactions and guarantees demanded have been refused, that recourse can be had legitimately to reprisals."

4. At the Brussels Conference of 1874, the following clauses formed part of the original Russian project submitted to the consideration of the meeting, but the delicacy of dealing with such a subject so soon after the Franco-German War of 1870-1, prevented an agreement being arrived at.

5. "*Art.* 69. Reprisals are admissible in extreme cases only, due regard being paid as far as possible to the laws of humanity when it shall have been unquestionably proved that the Laws and Customs of War have been violated by the enemy, and that they have had recourse to measures condemned by the law of nations.

6. "*Art.* 70. The selection of the means and extent of the reprisals should be proportionate to the degree of the infraction of the law committed by the enemy. Reprisals that are disproportionately severe are contrary to the rules of international law.

7. "*Art.* 71. Reprisals should be allowed only on the authority of the Commander-in-Chief, who shall likewise determine the degree of their severity and their duration."

8. Baron Jomini, delegate to, and President of, the Conference, said, with reference to this resolution :—" I regret that the uncertainty of silence is to prevail with respect to one of the most bitter necessities of war. If the practice could be suppressed by this reticence, I could not but approve of this course ; but if it is still to exist among the necessities of war, this reticence and this obscurity may, it is to be feared, remove any limits to its existence."

9. Mr. Farrer has brought together many instances of retaliation in warfare. He writes :—" That the fear of reprisals should act as a certain check upon the character of hostilities is too obvious a consideration not to have always served as a wholesome restraint upon military licence. When, for instance, Philip II. of Spain, in his War with the Netherlands, ordered that no prisoners of war should be released or exchanged, nor any contributions be accepted

as an immunity from confiscation, the threat of retaliation led to the withdrawal of his iniquitous proclamation. Nor would other similar instances be far to seek.

10. "Nevertheless, it is evident that, as seldom as war itself is prevented by consideration of the forces in opposition; will its peculiar excesses, which constitute its details, be restrained by the fear of retaliatory measures; and inasmuch as the primary offence is more often the creation of rumour than a proved fact, the usual result of reprisals is, not that one belligerent amends its ways, but that both belligerents become more savage, and enter on a fatal career of competitive atrocities.

11. "When the Duke of Alva was in the Netherlands, the Spaniards at the siege of Haarlem threw the heads of two Dutch officers over the walls. The Dutch in return beheaded twelve Spanish prisoners, and sent their heads into the Spanish trenches. The Spaniards in revenge hung a number of prisoners in sight of the besieged; and the latter in return killed some prisoners; and so it went on during all the time that Alva was in the country, without the least improvement resulting from such sanguinary reprisals.

12. "To all these cases the question asked by Vattel very pertinently applies: 'What right have you to cut off the nose and ears of the Ambassador of a barbarian, who has treated your Ambassador in that manner.' The question is not an easy one to answer, for we have no more right in war than in civil life to punish the innocent for the guilty, apart from the ordinary hostilities, even if otherwise we must dispense with redress altogether. To do so by intention and in cold blood is ferocious, whatever the pretext of justification, and is never worth the passing gratification it affords."

13. Mr. Farrer quotes many instances of reprisals made, and some more pleasant to read of, where abstinence from reprisals for breaches of the Custom of War has been rewarded by successful results. Among others, that which occurred in 1794, when the French Convention, as a measure of retaliation, having decreed that no English or Hanoverian prisoner was to be allowed any quarter, the

English Government refused to retaliate in a similar manner, and the decree was not enforced. (*Farrer*, pp. 95—98.)

STRATAGEMS.

25 Every mode of deceiving the enemy is allowable, which is not perfidious. No deceit is allowed where an express or implied engagement exists that the truth should be acted or spoken.

Halleck says:—"Stratagems in war are snares laid for an enemy, or deceptions practised on him *without perfidy*, and consistent with good faith. They are not only allowable, but have often constituted a great share of the glory of the most celebrated commanders.

Vattel says:—"If by a stratagem, by a feint *devoid of perfidy*, we can make ourselves masters of a strong place, surprise the enemy, and overcome him, it is much better, and is really more commendable, to succeed in this way than by a bloody siege, or the carnage of a battle."

The difficulty, as regards the legality of stratagems, is in defining what constitutes perfidy sufficient to condemn them.

The *American Instructions* of 1863 state:—

1. "*Art.* 101. While deception in war is admitted as a just and necessary means of hostility, and is consistent with honourable warfare, the common Law of War allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to proceed against them."
2. The Brussels Conference declared that, although stratagems are lawful (*Art.* 14) the abuse of the flag of truce, the national flag, or the military insignia or uniform of the enemy, are strictly forbidden. (*Art.* 13 *f.*)
3. The *American Instructions* also state the abuse of a flag of truce to be a heinous offence, rendering its bearer liable to treatment as a spy (*Art.* 114); and deception by means of

flags of protection to be an act of bad faith, of infamy, or fiendishness.

4. They also state in *Art.* 65 :—"The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the Laws of War."

5. The *French Manual* of 1884 says, pp. 18 and 19 :—"In time of war each belligerent is bound to be constantly on his guard, and knows that he must expect any description of surprise. He can only reckon on the enemy being faithful to written engagement, and to the duties imposed by the Laws of War.

6. "Soldiers hiding in a waggon of hay to penetrate into a fortress; a belligerent who ascertains his enemy's signals, and uses them to draw him into an ambuscade; who deceives them as to the number of his troops by giving a particular shape or dimension to his camp, or by his movements, or by lighting fires on abandoned positions—these are permissible stratagems, because perfidy has no part in them.

7. "But to demand a suspension of arms, and to break it by surprise; to pretend to surrender in order to approach closer and shoot the enemy; to use the white flag or red cross for waggons carrying the ammunition, supplies, or treasure of the army; or on buildings used for war purposes; or to use as an observatory a building protected by the Convention of Geneva :—all such proceedings are contrary to the obligations resulting from engagements freely extered into, and to the faith due to the enemy, and are forbidden."

8. The *French Manual* describes as permissible the use of the enemy's flags and uniforms, as a ruse to induce the enemy to enter an ambuscade, or approach closer, if the disguise ceases the moment the fighting begins. It is stated by Mr. Farrer, p. 127, that Bluntschli also, "the German publicist of greatest authority in our own day, expressly includes among the lawful stratagems of war the use of an enemy's uniform or flag." But such a proceeding must be at all times most questionable, savouring strongly

of perfidy, and, as will be seen above, is directly forbidden by *Art.* 65 of the *American Instructions*, as well as by the Brussels Conference of 1874.

9. Mr. Farrer states that the Romans for a long time of their history refrained from all kinds of stratagem as from a sort of military meanness, and quotes authorities to prove that they never resorted to stratagems until about the end of the second Punic War, 199 B.C. Under the Emperors, however, the Romans apparently used every sort of stratagem, even those most perfidious in their nature, and this appears to have been the case to a large extent during the Middle Ages. (*Farrer*, pp. 124—140.)

10. "A sounder sense of military honour was displayed by the English General, Lord Peterborough, at the siege of Barcelona in 1705. Don Velasco had promised to capitulate within a certain number of days, in the event of no succour arriving, and he surrendered one gate as a proof of his sincerity. During the truce involved in this proceeding, the German and Catalonian allies of the English entered the town, and began to plunder. Lord Peterborough undertook to prevent disorder in the town, expel the allied soldiery, and return to his position. He was taken at his word, acted up to it, and saved the honour of England." (*Farrer*, p. 138.)

DECEITFUL INTELLIGENCE.

26 Deceitful intelligence may be divided into two classes: false representations made in order that they may fall into the enemy's hands and deceive him; and the representation of one who feigns to betray his own party, with a view of drawing the enemy into a snare. Both are justifiable by the Laws of War.

The commanders sometimes make false representations of the numbers and positions of their troops, and of their intended military operations, for the purpose of having them fall into the enemy's hands, and of deceiving him; this is

not only allowable, but is regarded as a commendable *ruse de guerre*. (*Halleck*, ii. 29.)

1. The deception of the enemy by false despatches, fabricated journals, or by tampering with the enemy's spies is allowable. The tapping of the enemy's telegraph lines and transmitting on them false intelligence or orders supposed to emanate from his own officers, has frequently been done with great success. Instances occurred in the American War where the enemy was so deceived in this way as to send off large quantities of supplies which fell into the hands of the party telegraphing. In Egypt, also, in 1882, false orders were sent to the Egyptian authorities after Tel-el-Kebir in a similar manner, and with success.
2. Lord Wolseley (p. 249) recommends the deception of the enemy by spreading false news among the newspaper correspondents now attached to all civilized armies in the field.
3. The Duke of Wellington seems to have relied principally on absolute secrecy of his intentions as a means of deceiving the enemy as to his movements; and this secrecy he considered as very different from mystery. (*Despatch of June 28th*, 1804.)
4. It was agreed at the Brussels Conference (*Art.* 14), that resort to every possible method of obtaining information about the forces or country of an enemy should count as a fair military stratagem; and the importance to a military commander of sufficient and accurate information respecting the enemy can hardly be exaggerated. Nevertheless, with this question as with that of the stratagems admissible in war a line must be sharply drawn shutting out everything of the nature of perfidy towards the enemy, as well as all conduct soiling the personal honour of the soldier. Perfidious or dishonourable tricks may gain a present advantage, but this will be far too dearly bought at the price of destroying the high sense of personal honour which should animate every soldier, and without which he can neither respect himself, nor be respected by those for whose esteem he is ready to sacrifice his life. The moral force of this self-respect will have more military value than any

amount of successful deceit; and to have both in full force is impossible. British soldiers must not forget that they run a distinct danger from their close contact with Orientals, and their frequent wars with them; and that it is necessary to guard the standard of British military honour from the pernicious influence of Eastern morality.

CHAPTER III.

RESPECTING THE PERSON OF THE ENEMY.

THE ARMED FORCES.

27 THE *enemy* consists of his armed forces and the unarmed population of his country. The first principle of war is, that armed forces *as long as they resist* may be destroyed by all legitimate means. As soon as armed men submit they are entitled to be treated as prisoners of war.

1. The Brussels Conference laid down: "The armed forces of the belligerents may be composed of combatants and non-combatants. In the event of being captured by the enemy, both one and the other shall enjoy the rights of prisoners of war." (*Art.* 11.)

THE GIVING OF QUARTER.

28 Quarter should never be refused unless the Custom of War have been violated by those demanding it in such manner as to render them liable to suffer death. Even then their capture and trial is preferable if practicable. The *United States Regulations* of 1863 lays down on this point:—

"It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops

has the right to declare that it will not give, and therefore will not expect to receive, quarter; but a commander is permitted to direct his troops to give no quarter in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners." (*Art.* 60.)

1. The following regulations respecting the giving of quarter are also laid down by the same authority :—

"*Art.* 61. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

"*Art.* 62. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.

"*Art.* 63. Troops who fight in the uniform of their enemies without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

"*Art.* 66. Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter."

2. The *French Manual* of 1884 (p. 12) says : "There is a strict obligation to spare an enemy who submits, or has no longer the means of self-defence. Consequently, under no circumstances, either on account of intimidation, hatred, or vengeance, can it be declared in advance that no quarter will be given. In principle, quarter can neither be refused nor declined. This principle is of force with belligerents, who are neither authorized to refuse its benefits to the enemy, nor to proclaim beforehand that it will not be accepted by themselves. Such proceedings would soon cause war to take a savage character condemned by morality.

TREATMENT OF GARRISONS OF CAPTURED PLACES.

29 The garrisons and inhabitants of captured places are entitled to be treated as prisoners of war. The ancient

maxim of war, that an obstinate defence, after conditions of surrender have been offered, cancels all claim to mercy on the part of the besieger, is now condemned as contrary to humanity, and inconsistent with the principles on which the Laws of War are based.

It is not for the besieger to judge when the invested force have fulfilled the duty they owe to their country to defend the place to the utmost. Even when the possibility of prolonging a defence has nearly reached its limits, instances frequently occur in which even a few days' longer detention of the enemy before the place may be of vital consequence to the side of the defender. If there is any possibility of success whatever, the besieged are justified in holding out to the last extremity.

1. In case a place is closely besieged, it is customary for the besieging General to offer to the garrison honourable terms of capitulation; and if they refuse those terms, and the place is carried by force, they may be compelled to surrender at discretion, and the captor may treat such prisoners with all the severity of the Law of War. But that law, says Vattel, can never extend so far as to give a right to take away the life of an enemy who lays down his arms, unless he has been guilty of some crime against the conqueror.
2. Among other recorded instances of ancient practice, the following occurred in the war between the Dutch and the Spaniards in the 16th century. The captain of Weerd Castle, having previously refused to surrender to Sir Francis de Vere, begged at last for a capitulation with the honours of war. Vere's answer was that the honours of war were halters, for a garrison that had dared to defend such a hovel against artillery. The Commandant was killed first, and the remaining 26 men, having been made to draw black and white straws, the 12 who drew white straws were hanged, the thirteenth only escaping by consenting to act as executioner of the rest. (*Motley's United Netherlands*, iii. 323.)

DUTIES OF COMMANDERS OF BESIEGED PLACES.

30 By English military law any commandant who "shamefully abandons or delivers up any garrison" is liable to the penalty of death on conviction by court martial (*A. A.*, 4, 1.) The *Manual of Military Law*, issued by authority, notes that unless the surrender is justified by the *utmost necessity*, such as want of provisions or water, the absence of hope of relief, and the certainty or extreme probability that no further efforts could prevent the place, with its garrison, their arms and magazines, falling into the hands of the enemy, the surrender must be held to be shameful, and a crime under the Army Act.

It is of vital national importance that a very high standard should be maintained as regards obstinacy of defence necessary to justify surrender. History teems with instances in which the gallant and protracted defence of places have by their material and moral effects conferred great benefits on the State to which the defenders belong. Lord Wolseley gives the opinion, which may well be taken as a standard for English officers—"*An officer in command who abandons the defence of a post until at least two-thirds of his garrison are hors de combat should be shot.*"

1. The *French Military Law* (*Art.* 218) condemns to capital punishment every commandant who gives up his place without having forced the besiegers to pass by the slow and successive stages of a siege, and before having repulsed at least one assault on the body of the place by practicable breaches. This law was, however, not complied with in the defence of any places besieged by the Germans in 1870-1. Paris and Metz were starved out. At Strasburg and other places the towns were too much exposed to fire to enable the defence to be carried to great extremity.
2. A French decree of the 13th October, 1863 (*Art.* 255),

lays down : "The commandant of a place of war should never lose sight of the fact that he defends one of the gates of the Empire, one of the points of support for its armies, and that on the surrender of a place, hastened or retarded by a single day, may depend the safety of the country." (*General Ambert*, p. 230.)

3. The French decrees had considerable effect during the Peninsular War, and are quoted by the Duke of Wellington as the reason why he did not summon Badajoz or Burgos, knowing that French officers were ordered not to surrender a place before it was stormed. On September 10th, 1813, he writes to Earl Bathurst : "Under the Ordonnance recently issued by the French Government, the difficulties of the operations of a siege and the length of time it must take, are greatly increased ; and they can be brought to a conclusion only by the storm of the breach of the body of the place."

4. The following remarks on this subject are made by a recent French military author. A Commandant of a fortified place should have always before his mind the patriotic words of Fabert and the energetic conduct of the Governor of Prague in 1757. The statue of Fabert in the Cathedral Square of Metz bears as an inscription the words used by him when defending that fortress : "If, to prevent a place entrusted to me by the king from being taken it is necessary to put in the breach my goods, my person, my family, I would not hesitate to do it."

After having gained the Battle of Prague, Frederick the Great bombarded this populous city for 22 days. The projectiles, although round, and fired from poor cannon, none the less accomplished their work of destruction. The inhabitants wished the Governor to surrender. He hanged two of the principal citizens, and by his energetic attitude forced the inhabitants to remain quiet and the Prussians to raise the siege. In Phalsbourg, when besieged in 1870, somewhat similar action was taken. (*Les Forteresses Françaises*, 1870-1, *par Lieut.-Colonel Prevost*, p. 47.)

TREATMENT OF THE ENEMY'S WOUNDED OR SICK.

31 The enemy's wounded and sick must not only be spared, but as far as possible receive care equal to that given to one's own wounded.

The Brussels Conference of 1874 declares in *Art.* 35, that the duties of belligerents with regard to the sick and wounded are regulated by the Convention of Geneva of August 22nd, 1864, subject to the modifications which may be introduced into that Convention.

The Geneva Convention laid down :—

1. "*Art.* VI. Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong. Commanders-in-chief shall have the power to deliver immediately to the outposts of the enemy soldiers who have been wounded in an engagement, when circumstances permit this to be done, and with the consent of both parties. Those who are recognized after their wounds are healed as incapable of serving, shall be sent back to their country. The others may also be sent back, on condition of not again bearing arms during the continuance of the war.
2. "Under *Art.* V. of the additional articles, the wounded who fall into the enemy's hands shall be sent back to their own country after they are cured, or sooner if possible, on condition of not bearing arms again during the continuance of the war, except officers whose detention might be important to the fate of arms.
3. "*Art.* XI. Wounded or sick sailors and soldiers, when embarked, to whatever nation they may belong, shall be protected and taken care of by their captors.
4. "*Art.* X. Any merchantman, to whatever nation she may belong, charged exclusively with removal of sick and wounded, is protected by neutrality; but the mere fact, noted in the ship's books, of the vessel having been visited by an enemy's cruiser, renders the sick and wounded incapable of serving during the continuance of the war.

The cruiser shall even have the right of putting on board an officer in order to accompany the convoy, and thus verify the good faith of the operation."

5. The *American Instructions* of 1863 state :—

"*Art.* 71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the army of the United States, or is an enemy captured after having committed his misdeed.

"*Art.* 79. Every captured wounded enemy shall be medically treated, according to the ability of the medical staff."

6. The *French Manual* of 1884, pp. 41—50, gives the clauses of the Geneva Convention, and points out that any infraction of them is a violation of solemnly attested faith. "Apart from other sanctions, the keeping of the treaty is confided to the honour of the army. The military authority should consequently see that its stipulations are well known and strictly observed. It is necessary that those having the right of inviolability should be able to exercise their functions without running the risk of arrest or ill-treatment by ignorant soldiers."

7. During the Franco-German War of 1870-1, after the first occupation of Amiens, the Prussians marched out, leaving their wounded behind. The Mayor, having no armed force with which to protect them, and serious fears being entertained for their safety, wrote over the doors of the hospitals, "*Honneur d'Amiens! Respect aux blessés!*" This act restrained the excited townspeople.

DISPOSAL OF THE ENEMY'S DEAD.

32 Respect for the dead is an absolute law with all civilized nations. After a battle between civilized combatants it is usual to agree on a suspension of arms for the purpose of burying the dead. The mutilation or dishonouring of the dead is disgraceful and abhorrent to the laws of civilized warfare.

1. In the interest of families, and of the regularity of civil life, the belligerents communicate to each other the lists of dead fallen into their power; it is never necessary, even on the field of battle, to bury a deceased enemy without keeping his pocket-ledger (*livret*), or, in default, the number of his regiment and of his company, and any other things tending to establish his identity. These signs of identity are communicated as quickly as possible to the enemy, at the same time remitting these objects found on the defunct which were his personal property. (*French Manual*, p. 51.)
2. The exigencies of battle may sometimes render even respect for the dead temporarily impossible. During the fighting under Skobeleff at Plevna, when defending a captured redoubt against the attempts of the Turks to take it, the bodies of the dead, friend and foe together, were used to fill up gaps in the parapet shattered by the enemy's artillery.
3. At the Brussels Conference it was proposed by Colonel Brun, the Danish delegate, that after a battle belligerents should be bound to communicate to the adversary a list of the killed and wounded who have fallen into their hands; and that to facilitate this measure, it would be desirable that each soldier should be furnished with something indicating his number, name, and the name of his regiment, as well as the number of his company. General von Voigts-Rhetz considered this might be done by providing the men with signs or marks bearing the number of the soldier, as well as that of his company and regiment. This proposition was made because it was said there were cases in recent wars where families had been left a whole year in a state of uncertainty as to the fate of their relatives. The plan proposed is in vogue in the German army, but there is nothing analogous to it in the British army. (*Blue Book*, pp. 34, 223.)

TREATMENT OF AMBULANCES, HOSPITALS, AND MEDICAL STAFF, ETC.

33 Surgeons and other persons in attendance on the wounded are exempt from attack, unless actually bearing arms.

In order to obtain protection under the Geneva Convention, hospitals and ambulances, and the individuals employed in them, must be protected by a flag or arm-badge (*brassard*) bearing a red cross on a white ground.

1. The Geneva Convention laid down:—

"*Art.* I. Ambulances and military hospitals shall be acknowledged to be neuter, and, as such, shall be protected and respected by belligerents so long as any sick or wounded may be therein. Such neutrality shall cease if the ambulances or hospitals are guarded by a military force. (This refers merely to a picquet to keep off marauders, &c.)

2. "*Art.* II. The *personnel* of the hospitals and ambulances, including the staff for superintendence, medical service, administration, transport of wounded, as well as chaplains, shall participate in the benefit of neutrality whilst so employed, and so long as there remain any wounded to recover or attend.

3. "*Art.* III. The persons designated in the preceding article may, even after occupation by the enemy, continue to fulfil their duties in the hospital or ambulance which they serve, or may withdraw in order to rejoin the corps to which they belong. Under such circumstances, when these persons shall cease from their functions, they shall be delivered by the occupying army to the outposts of the enemy.

4. "*Art.* IV. As the equipment of military hospitals remains subject to the Laws of War, persons attached to such hospitals cannot, in withdrawing, carry away any articles but such as are their private property. Under the same circumstances an ambulance shall, on the contrary, retain its equipment.

5. "*Art.* V. Inhabitants of the country who may bring help to the wounded shall be respected, and shall remain free.

6. "*Art.* VII. A distinctive flag and uniform will be adopted for hospitals, ambulances, and evacuations. It should under all circumstances be accompanied by the national flag. An arm-badge (*brassard*) shall, in the same manner, be allowed for persons neutralized, but the delivery thereof

shall be left to military authority. The flag and the arm-badge shall bear a red cross on a white ground."

During the Brussels Conference of 1874, Sir Alfred Horsford reported that the opinions elicited in the course of the sitting showed the necessity for a speedy reconsideration of the Geneva Convention, if in future campaigns its provisions are to be respected.

7. Under the additional articles of the Geneva Convention agreed to in 1868, and adhered to during the Franco-German War, it was laid down:—

"*Art.* 1. Persons employed in hospitals and ambulances (see *Art.* II. above) shall, after the occupation by the enemy, continue to fulfil their duties, according to their wants, to the sick and wounded in the ambulance or the hospital which they serve. When they request to withdraw, the commander of the occupying troops shall fix the time of departure, which he shall only be allowed to delay for a short time in case of military necessity.

8. "*Art.* 3. Under the conditions specified in *Arts.* I. and IV. of the Convention, the name ambulance applies to field hospitals and other temporary establishments which follow the troops on the field of battle to receive the sick and wounded."

9. During the Franco-German War of 1870, French medical officers, protected by the badge of Geneva, attended their own wounded at Soulz les Forêts, after the battle of Woerth. Even irregular workers under the Geneva badge, although arrested, were not detained by either side. (*Russell's Diary during the War.*) The Prussians during their occupation of Versailles required a bulletin of the health of the wounded Frenchmen lying in the hospital of that town to be sent to the Commanding General every morning. The convalescents received an immediate order to leave for Germany as prisoners of war. (*Delerot, Versailles*, 1870.)

10. A German official having given notice in writing, on the 21st December, 1870, to the International French Society of Versailles that it was dissolved, and that the members of ambulances who were not natives of Versailles were to leave for the adjoining departments within the

space of two days; this order was annulled by the Prussian General in command, who requested the society to continue their duties. (*Delerot, Versailles*, 1870.)

11. At the Brussels Conference there was prolonged discussion on the question of ambulances, hospitals, &c. With reference to the neutrality of ambulances under the Geneva Convention, the first delegate from Germany, General von Voigts-Rhetz, maintained, that on the victor who captured the ambulances would devolve the care of the wounded, and that he should therefore have the right of disposing of the captured *matériel*. All the *matériel* employed in war should be subject to the Laws of War, the *personnel* remaining neutral. It was objected to this proposal that it would enable the victor to deprive his adversary of the means of saving his wounded, and if he suffered a reverse, would leave his own wounded without medical care, and that all armies have a common interest in preserving the neutrality of ambulances and moveable hospitals as the only means of securing for the wounded the first aid at hand. To this General von Voigts-Rhetz answered, that the *personnel* being restored after they had performed their immediate duty to the wounded, new ambulances and hospitals might be organized for them, or a reserve of them would be provided beforehand. "The ambulances which fall into the enemy's hands are, generally speaking, indispensable to the victor, not only at the moment of success, but for a long period. At the present time, after every battle, the number of wounded is so great that the entire medical service of an army is not sufficient to tend its own troops. What is to be done if, having on your hands all the enemy's wounded, you are to restore to the enemy the *matériel* of his hospitals. The victorious army would be for a long time deprived of its own ambulances. Is it humane to leave this army without hospitals during the rest of the campaign." "Any one who has made war must know that there is nothing more difficult than to make the ambulances which have been in the battle-field follow the army when it advances. All the commanding officers of German army corps state, that the greatest difficulties are experienced when the *matériel* of hospitals is restored.'

The opinion of most of the delegates was opposed to General von Voigts-Rhetz's proposals as annulling one of the essential provisions of the Convention of Geneva, and making impossible the action of the private Red-Cross Societies, who would not act if their *matériel* was liable to capture.

12. General von Voigts-Rhetz observed, that the Geneva Convention would require revision, and that had there been as many military men as doctors in it it would have been drawn up differently originally. (*Blue Book*, pp. 221, 230.

TREATMENT OF NON-COMBATANTS.

34 Troops in the field are always accompanied by a certain number of auxiliaries who take no direct part in the hostilities. Some are attached to the medical service, as doctors, dispensers, or as clergymen attached to the ambulances. These, under certain conditions, are assured inviolability by the Convention of Geneva. (See Treatment of Wounded, Hospitals, &c.) In addition to these are other persons attached to the army in various capacities, who contribute to the working of its organization; such are, notably, the officers and functionaries charged with the administration of police and justice, the members of the supply branches, contractors, sutlers, guides, convoys, messengers, balloonists, telegraph and railway *employés*, &c.

Although these persons may not fight, they are no less adversaries, whose action it is the interest of the enemy to suppress, since their assistance is useful to the combatants proper. Left at liberty, they would rejoin the national flag and help to prolong the struggle. The usages of war consequently authorize the seizure of their persons, but this is on the condition that they shall be treated as prisoners of war. The benefit of this treatment is due to them, although at the moment of capture they were not in uniform. It is sufficient

that they prove their position. Nevertheless the wearing of uniform or some mark of their calling will much facilitate their identification. (*French Manual*, pp. 37, 38.)

1. The *American Instructions* of 1863 state :—
   "*Art.* 50. Citizens who accompany an army for whatever purpose, such as sutlers, editors or reporters of journals, or contractors, if captured may be made prisoners of war, and be detained as such."
2. The Brussels Conference of 1874 laid down :—
   "*Art.* 34. Persons in the vicinity of armies, but who do not directly form part of them, such as correspondents, newspaper reporters, *vivandiers*, contractors, &c., may also be made prisoners of war. These persons should, however, be furnished with a permit issued by a competent authority, as well as with a certificate of identity."
3. Under special circumstances, the auxiliaries in question may be, in spite of themselves, engaged in fight, and obliged in self-defence to draw the sword or to fire. By doing so they do not lose the right of being treated as prisoners of war if captured. (*French Manual of* 1884, p. 38.)
4. *Newspaper Correspondents.* At the Brussels Conference of 1874 it was proposed by the Netherlands delegate to insert the following clause :—" Correspondents or reporters of newspapers, who have taken no active part in the operations of the war, shall enjoy the rights of neutrality," on the ground that they gave no strength to the enemy, and should have special protection in the interests of publicity. The German delegate, General von Voigts-Rhetz, did not agree; he looked upon correspondents as ordinary inhabitants, who may possibly do no harm, but sometimes certainly do so. If correspondents who have spread false reports, calumniated the army in whose quarters they have lived, and acted in any way perfidiously in the exercise of their profession, fall by chance into the hands of the army which they have cried down, it cannot be required that they should be sent back to recommence the same business the next day. They should be interned

in order to deprive them of the possibility of doing harm. The proposition was consequently dropped. (*Blue Book*, p. 260.)

5. *Prisoners' Aid Societies.* At the discussion at the Brussels Conference General Voigts-Rhetz, the first German delegate, pointed out with regard to the employment of international societies, that very serious inconvenience may result, from a military point of view, from the presence, in the territories of belligerents, of delegates charged with affording aid to prisoners. "They will observe that in one particular place or province a remount of cavalry is being made, that in another a concentration of artillery is going on, that elsewhere there may be a place well or ill supplied with provisions, &c. On their return they would spread this information, and might thus check the success of important military combinations. (*Blue Book*, p. 226.)
6. *Red-Cross Societies.* Both the German and the French delegates called attention to the abuses committed under cover of the Red-Cross. They especially cited cases of individuals who introduced themselves into the ranks of the army for the purpose of plundering the sick and wounded. To prevent this it was proposed that the hospitallers (*hospitaliers*) should be provided with a certificate of identity of recent date, containing a description and the signature of the bearer, and even his photographic portrait. (*Blue Book*, p. 234.)

TREATMENT OF MESSENGERS.

35 If a messenger is an officer or soldier in uniform, who openly attempts to cross the enemy's lines to carry a despatch to another corps, his right to be treated as a prisoner of war in case of capture is incontestable.

The same is the case with a civilian messenger who undertakes his mission openly, and under such conditions that the enemy can from his appearance alone understand his business. Here again the question of uniform is often all-

important. If their dress is such as to draw attention in penetrating into the enemy's lines, they expose themselves to be fired on if they refuse to stop and give themselves up. Under such circumstances they are declared enemies, to whom the privileges of belligerents cannot be denied.

More often persons, who from patriotism or interest undertake the duty of carrying despatches from one camp to another through the lines of the enemy, proceed cunningly; far from proclaiming their object, they do all they can to dissemble and to give themselves the character of inoffensive inhabitants, travelling for personal reasons. If such persons are discovered and arrested, they cannot claim to be treated as prisoners of war, but are reserved for military justice, which decides, according to circumstances, if they should be considered as spies or traitors.

The lot of captured messengers depends on the question of good faith. If they have done nothing to deceive the legitimate trust of the adversary, they are treated as loyal enemies, and considered as prisoners of war. If they have used perfidy they are punished, after having been judged, according to law.

Individuals in balloons who carry despatches, as they act openly and without perfidy, have a right to be regarded as regular belligerents, and to be considered as prisoners of war if captured. They can, however, be fired upon on their journey, and their correspondence can be seized. (*French Manual* of 1884, pp. 39, 40.)

1. The *American Instructions* of 1863 state :—

"*Art.* 99. A messenger carrying written despatches or verbal messages from one portion of the army, or from a besieged place, to another portion of the same army, or its government, if armed, and in the uniform of his army, and if captured while so doing in the territory occupied

by the enemy, is treated by the captor as a prisoner of war. If not in uniform nor a soldier, the circumstances connected with his capture must determine the disposition made of him.

2. "*Art.* 100. A messenger or agent who attempts to steal through the territory occupied by the army to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case."

3. *Balloonists.* At the Brussels Conference it was laid down, *Art.* 22, that individuals sent in balloons to carry despatches are not to be considered as spies.

During the discussion at this Conference, General von Voigts-Rhetz, the first German delegate, requested that it should be laid down in the Protocol that individuals who have ascended in balloons may be summoned to descend; that if they refuse to do so, they may be fired at, and when they are captured they shall become prisoners of war, and shall not in any case be treated as spies. (*Blue Book*, p. 201.)

TREATMENT OF THE GENERAL POPULATION.

36 Subjects of the hostile State who are non-combatants, and refrain from all acts of hostility, are exempt from the direct operations of war by the custom of all civilized nations in modern times. The general population should not be treated with violence if they abstain from acts of hostility; they cannot be compelled to assist the operations of the invader, but may be made to act as guides, drivers, and workmen, on payment for their services. They may also be compelled to deliver up their arms, to give security for good conduct, and to conform to such rules and demands as are considered necessary for the security of the army.

It was agreed by the Brussels Conference as one of the principles governing their deliberations, that "Operations of war must be directed exclusively against the forces, and the

means of making war, of the hostile State, and not against its subjects, so long as the latter do not themselves take any active part in the war." (*Blue Book*, p. 197.)

1. "Feeble old men, women and children, and sick persons come under the general description of enemies, and belligerents have certain rights over them as members of the community with which they are at war; but as they are enemies who make no resistance, they have no right to maltreat their persons, or to use any violence towards them, much less to take their lives. . . . Modern practice has applied the same rule to ministers of religion, to men of science and letters, to professional men, artists, merchants, mechanics, agriculturists, labourers—in fine, to all non-combatants, or persons who take no part in the war, and make no resistance to the enemy.
2. "So long as they refrain from all hostilities, and pay the military contributions which may be imposed on them, and quietly submit to the authority of the belligerent who may happen to be in the military possession of their country, they are allowed to continue in the enjoyment of their property, and in the pursuit of their ordinary avocations." (*Halleck*, ii. 70.)

37 This exemption of the enemy's persons from the extreme rights of war is strictly confined to non-combatants, or such as refrain from all acts of hostility. If the peasantry and common people of a country use force, or commit acts in violation of the mild rules of modern warfare, they subject themselves to the common fate of military men, and sometimes to a still harsher treatment. (See Irregular Combatants.) If ministers of religion and females so forget their profession and sex as to take up arms, or to incite others to do so, they are no longer exempted from the rights of war, although always within the rules of humanity, honour, and chivalry.

1. Even if a portion of the non-combatant inhabitants of a particular place become active participants in the hostile

operations, the entire community are sometimes subjected to the more rigid rules of war.

2. In some cases, even where no opposition is made by the non-combatant inhabitants of a particular place, the exemption extends properly no further than to the sparing of their lives; for if the commander of the belligerent forces has good reason to mistrust the inhabitants of any place, he has a right to disarm them, and to require security for their good conduct. He may lawfully retain them as prisoners, either with a view to prevent them from taking up arms, or for the purpose of weakening the enemy.
3. Even women and children may be held in confinement, if circumstances render such a measure necessary, in order to secure the just objects of the war; but if the General, without reason and from mere caprice, refuses women and children their liberty, he will be taxed with harshness and brutality, and will be justly censured for not conforming to a custom established by humanity. When, however, he has good and sufficient reasons for disregarding in this particular the rules of politeness and the suggestion of pity, he may do so without being justly accused of violating the Laws of War. The presumption, however, is against him, and if he wishes to preserve a fair fame, he must give good and satisfactory reasons for conduct so unusual. (*Halleck*, ii. 70—73.)

38 The *American Instructions* of 1863 state :—

"The unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war." (*Arts.* 22, 23.)

"*Art.* 26. Commanding Generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance, or an oath of fidelity to their own victorious Government or rulers, and they may expel every

one who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives."

1. The Brussels Conference of 1874 lays down :—
   "*Art.* 36. The population of an occupied territory cannot be compelled to take part in military operations against their own country.
2. "*Art.* 37. The population of occupied territories cannot be compelled to swear allegiance to the enemy's power.
3. "*Art.* 38. The honour and rights of the family, the life and property of individuals, as well as their religious convictions and the exercise of their religion, should be respected. Private property cannot be confiscated.
   "*Art.* 39. Pillage is expressly forbidden."

39 The *American Instructions* of 1863, with a jealous regard to the honour of the armies of the United States, decree the severest punishment for those who maltreat the inoffensive inhabitants of occupied territory. They state :—

"*Art.* 44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage and sacking, even after taking a place by main force; all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence. A soldier, officer, or private in the act of committing such violence, and disobeying a superior ordering him to abstain from it, *may be lawfully killed on the spot by such superior.*

1. Under the Army Act, any person subject to military law who on active service wilfully destroys or damages property without orders, is liable (under § 5. 2) to penal

servitude on conviction thereof. Any such offender who leaves his commanding officer to go in search of plunder (6 *a*); does violence to any person bringing provisions or supplies to the forces; or commits any offence against the property or person of any inhabitant of, or resident in, the country in which he is serving (6 *f*); or breaks into any house or any place in search of plunder (6 *g*); is liable, on conviction, when on active service, to suffer death.

2. As all persons accompanying a British army in the field are subject to military law either as officers or soldiers, crimes of this sort might be quickly punished by means of a summary court martial. But for extreme cases in times of excitement, direct and immediate execution by a superior as sanctioned in the above American regulations would probably be the only efficient remedy.

3. The *French Manual* of 1884 states (p. 106):—"In his dealings with the population the soldier is bound to the same reserve as if in garrison in his own country. He ought to abstain, as from a crime, from all attempts against the life of individuals or violence on their persons. He is absolutely obliged to respect the honour and the rights of the family, to do nothing against the modesty of women, the purity of children, the venerable feebleness of old age. Murder, extortion by threats, wounding, violence, offences against morality, arbitrary arrests or sequestrations, the carrying away of minors and violent abductions are crimes, whether in war or peace, in the enemy's country or at home. Punishment for these will be given according to the military code, and officers must prevent and suppress all excess on the part of their men."

4. Respect for persons implies respect for religious conviction and worship. The invader should in no way interfere with religious ceremonies, if they do not constitute a danger for his own security or for public order. He will abstain from every act which can be considered profanation, and he will avoid, as much as possible, altering the use of consecrated buildings. He cannot be forbidden from taking temporary possession of a church or temple to use as an ambulance or to shelter his troops, or even to use for

religious purposes; but these are delicate questions, not to be raised unnecessarily, and to be conducted with prudence and conciliation.

5. A French military writer pays what, considering the circumstances and the nationality of the writer, is really a high tribute to the good conduct of the German soldiery, by saying: "It is only justice to the German soldiers to say, that even in their greatest excesses they have respected women." (*Prevost*, p. 43.)

TREATMENT OF THE POPULATION OF CAPTURED TOWNS.

40 The mode of treating an enemy's town immediately after capture in order to ensure order and the safety of the occupying force, can best be exemplified by quoting the German proclamation in the case of Strasburg and Metz.

1. At the occupation of Strasburg by the Germans on the 28th Sept., 1870, after its capitulation, a Baden soldier was shot in a by-street, and another wounded. The assassin was captured and shot on the spot. General Werder, on hearing of this, ordered the city to pay a contribution of four million francs, but this was afterwards remitted. On the next day the following order was issued:

   "The state of siege still continues. Crimes and offences will be punished by martial law. All weapons are immediately to be given up. All newspapers and publications are forbidden until further orders. Public-houses to be closed at 9 p.m.; after that hour every civilian must carry a lantern. The municipal authorities have to provide quarters, without food, for all good men." (*Franco-Prussian War*, ii. 69.)

2. After the capitulation of Metz the German Commandant issued a proclamation to the following effect:

   "The fortress of Metz was occupied yesterday by the Prussian troops, and the undersigned is provisionally commandant of the place. I would wish to maintain among the Prussian troops their known discipline, the liberty of the person, and the security of property. Difficulties may occur at first to the inhabitants before all affairs are

properly regulated; but they ought to be brought to me, and I shall know how to appreciate the circumstances under which the difficulties have occurred. If I encounter disobedience or resistance, I shall act with all severity and according to the Laws of War; whoever shall place in danger the German troops, or shall cause prejudice by perfidy, will be brought before a council of war; whoever shall act as a spy to the French troops, or shall lodge or give them assistance; whoever shows the roads to the French troops voluntarily; whoever shall kill or wound the German troops, or the persons belonging to their suite; whoever shall destroy the canals, railways, or telegraph wires; whoever shall render the roads impracticable; whoever shall burn munition and provisions of war; and lastly, whosoever shall take up arms against the German troops, will be punished by death. It is also declared (1) The houses in which, or out of which, any one commits acts of hostilities towards the German troops will be used as barracks; (2) No more than ten persons will be allowed to assemble in the streets or public places; (3) The inhabitants must deliver up all arms by 4 p.m. on Monday, the 31st of October, at the Palais, rue de la Princerie; (4) All windows are to be lighted up during the night in case of an alarm.

"VON KUMMER."

Metz, October 30th, 1870.

(*Franco-Prussian War*, ii. 124.)

PRISONERS OF WAR.

41 The *American Instructions* of 1863 define a prisoner of war to be a public enemy armed, or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

"All soldiers, of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the army for its efficiency, and promote

directly the object of the war, except such as are hereinafter provided for; all disabled men or officers in the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences, as well as entitled to the privileges, of a prisoner of war.

"Citizens who accompany an army, for whatever purpose, such as sutlers, editors, reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such.

"The members of the hostile reigning family, male or female, the officers of the hostile Government, its diplomatic agents, and all persons who are of use to the hostile army or its government, are, if captured on belligerent ground, and if unprovided with a safe-conduct granted by the captor's Government, prisoners of war." (*American Instructions*, 49, 50.)

1. The Brussels Conference of 1874 laid down:—
   "*Art.* 11. The armed forces of the belligerents may be composed of combatants and non-combatants. In the event of being captured by the enemy, both one and the other shall enjoy the rights of prisoners of war.
2. "*Art.* 34. Persons in the vicinity of armies, but who do not directly form part of them, such as correspondents, newspaper reporters, vivandiers, contractors, &c., may also be made prisoners of war. These persons should, however, be furnished with a permit issued by a competent authority, as well as with a certificate of identity."

TREATMENT OF PRISONERS OF WAR.

42 In the treatment of prisoners of war as much restraint is justified as will prevent their taking part in the war. They cannot be compelled to aid their captors in military operations, but may be employed in occupations suitable to their

condition. When made to work they should be credited with earnings for such work as they perform.

A prisoner cannot be punished or ill-treated for refusing to give information respecting his own side. The rules to which prisoners of war are to be subject should in all cases be read, and, if necessary, explained to them.

1. The Brussels Conference of 1874 declared :—
"*Art.* 23. Prisoners of war are lawful and disarmed enemies. They are in the power of the enemy's Government, but not of the individuals, or of the corps who made them prisoners. They should be treated with humanity. Every act of insubordination authorizes the necessary measures of severity to be taken with regard to them. All their personal effects, except their arms, are considered to be their own property.
2. "*Art.* 24. Prisoners of war are liable to internment in a town, fortress, camp, or in any locality whatever, under an obligation not to go beyond certain fixed limits; but they may not be placed in confinement (*enfermés*) unless absolutely necessary as a measure of security.
3. "*Art.* 25. Prisoners of war may be employed on certain public works which have no immediate connection with the operations on the theatre of war, provided the employment be not excessive, nor humiliating to their military rank if they belong to the army, or to their official or social position if they do not belong to it. They may also, subject to such regulations as may be drawn up by the military authorities, undertake private work. The pay they receive will go towards ameliorating their position, or will be placed to their credit at the time of their release. In this case the cost of their maintenance may be deducted from their pay.
4. "*Art.* 26. Prisoners of war cannot be compelled in any way to take any part whatever in carrying on the operations of war.
5. "*Art.* 27. The Government in whose power are the prisoners of war undertakes to provide for their maintenance. The conditions of such maintenance may be settled by a mutual

understanding between the belligerents. In default of such an understanding, and as a general principle, prisoners of war shall be treated, as regards food and clothing, on the same footing as the troops of the Government who made them prisoners.

6. "*Art.* 29. Every prisoner is bound to declare, if interrogated on the point, his true name and rank, and in the case of his infringing this rule, he will incur a restriction of the advantages granted to the prisoners of the class to which he belongs.

7. "*Art.* 28. Prisoners of war are subject to the laws and regulations in force in the army in whose power they are. This was explained as meaning that their punishment should be the same for escaping as that of a soldier leaving his quarters without permission."

8. The *American Instructions* of 1863 state:—

"*Art.* 75. Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

9. "*Art.* 76. Prisoners of war shall be fed upon plain and wholesome food whenever practicable, and be treated with humanity. They may be required to work for the benefit of the captor's Government according to their rank and conditions.

10. "*Art.* 56. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering or disgrace by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

11. "*Art.* 59. A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities. All prisoners of war are liable to the infliction of retaliating measures.

12. "*Art.* 72. Money and other valuables on the person of a prisoner, such as watches or jewellery, as well as extra clothing, are regarded by the American army as the private

property of the prisoner, and the appropriation of such valuables or money is considered dishonourable, and is prohibited. Nevertheless, if *large* sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the army, under the direction of the Commander, unless otherwise ordered by the government. Nor can prisoners claim as private property large sums found and captured in their train, although they had been placed in the private luggage of the prisoners.

13. "*Art.* 73. All officers when captured must surrender their side-arms to the captor. They may be restored to the prisoner in marked cases by the Commander to signalize admiration of his distinguished bravery, or approbation of his humane treatment of prisoners before his capture. The captured officer to whom they may be restored cannot wear them during captivity."

14. The *French Manual* of 1884 also states:—"That the private property of prisoners taken from them during their captivity should be returned to them on their release."

15. Prisoners of war are usually subjected to internment, that is to say, their place of residence is dictated, they are obliged to answer daily roll-calls, and subjected to special surveillance. They can even be imprisoned, if the chances of war or other circumstances make it necessary, but their imprisonment shall end as soon as the reason for it ceases. If they fail to appear at roll-calls, or otherwise offend against discipline, they are also subject to imprisonment.

16. They can be compelled to work. The work of military men must be apportioned according to rank, but regard may be had for any special aptitude individuals may possess. Civil prisoners are given work in accordance with their social position. As a favour prisoners may be allowed to work at private industries, to temporarily live out of the depôt, their salaries being settled by the heads of the workshop and the military authority. The amount they earn in this way serves to better their position, or is sent with them in lump on their liberation.

17. In France, no profit is retained by the State from the

amounts earned by prisoners of war; in other countries the expense of their maintenance is deducted, this proceeding not being forbidden by the law of nations.

18. In ancient times, both among the Greeks and Romans, and during the Middle Ages, the allowed right of the conqueror, and frequently the practice, was to kill prisoners; but this was lessened in severity among the former by the desire to obtain money by selling the prisoners as slaves, and among the latter by the hope of obtaining ransom for them. Many instances will be found in Farrer (*chaps.* i., iv.).

19. The discussion on the treatment of prisoners, as on other subjects, at the Brussels Conference, is very instructive as bringing out the points on which difficulties may occur.

As regards the use of violence towards prisoners, General von Voigts-Rhetz, first German delegate, considered that the case of mutiny must be provided for, as well as of a prisoner's positive disobedience to orders. Should he refuse, for instance, to march, sufficient violence must be used to make him obey. The Prussian code states that the offences of prisoners shall be regulated by the law of the country which captures them. There are circumstances under which it is impossible to apply to the tribunals, for instance, during a battle. The second Russian delegate, General de Leer, considered that even where a prisoner commits an offence, violence should not be used against him; to which General von Voigts-Rhetz agreed, but pointed out that if during battle, prisoners refused to go to the place assigned them, they must be forced to go. It is the duty of every officer to prevent insubordination. The prisoner must march, obey, and accept the authority of the party by whom he is taken prisoner.

20. The Spanish delegate wished for the insertion of an Article as follows: "Troops escorting a convoy of prisoners may not execute them, even in the case of their being attacked during their march by the hostile force, and whose object is to rescue the said prisoners. But if the prisoners take part in the combat in any way they forfeit by this act their character as prisoners of war." This was stated to be already provided for in the general

principles laid down, but was ordered to be recorded in the Protocol.

21. It was explained during discussion that the term "disarmed" applied to a prisoner, applies to a defeated officer even when his sword has been returned to him, as he may no longer use it.

22. Also, that where prisoners have large sums of money they may be deprived of it, as their escape would be facilitated thereby, but that receipts for it should be given and the money repaid later on. (*Blue Book*, p. 212.)

MAINTENANCE OF PRISONERS OF WAR.

43 It is the duty of a State to support its subjects while prisoners in the hands of an enemy. Although a State may properly, under certain circumstances, refuse to exchange its prisoners, it cannot, without a violation of moral duty, neglect to make the proper necessary arrangement for their support while they are thus retained by a captor who is willing to exchange them.

It is the modern custom for each captor to support the prisoners in his hands until an exchange can be effected, or until they are released. Where this is done the support given is usually limited to the regular provision ration, and such clothing and fuel as may be absolutely necessary to prevent suffering. Officers and other persons who have the means of paying for their support cannot require any assistance from the captor, but such as have no money are certainly entitled to an allowance sufficient for personal comfort; and modern custom and military usage require that it should be proportioned to the rank, dignity, and character of the prisoner. Such prisoners are, however, bound to provide for their own support as soon as they can procure the means of doing so.

1. The moneys expended for the support of prisoners of war constitute a just demand for reimbursement on the con-

clusion of peace. Indeed, all moneys expended for the support of prisoners of war, under ordinary circumstances, are deemed to be on account of their own Government, and such accounts are either settled by commissioners during the war, or become subjects of stipulations in a treaty of peace. (*Halleck*, ii. 87.)

2. The *French Manual* of 1884 says on this point (p. 76): "The Government in whose power the prisoners are is bound to provide for their support. As to the cost of their support, International Law lays down nothing definite; the point is generally made the object of an agreement between the belligerents, either while hostilities continue, or at the negotiations for peace. In any case, the prisoners should always be properly maintained, and, if possible, on the same footing as the national troops." The French regulations of 1859, whose prescriptions are recognized as conformable to the Laws of War, assure them a healthy diet, without granting them the advantages reserved for soldiers in the field.

PRISONERS OF WAR ATTEMPTING TO ESCAPE.

44 A prisoner of war is justified in attempting to escape; he may be shot in the act, but if not then killed cannot be punished for his attempt afterwards. He may, however, be placed under stricter surveillance. The rising of prisoners with a view to a general escape may be rigorously punished. The desire of prisoners of war to escape is natural and even commendable, but attempting it constitutes an act of resistance and hostility which the captor has a right to prevent or suppress.

1. The Brussels Conference of 1874 states:—

"*Art.* 28. Arms may be used, after summoning, against a prisoner attempting to escape. If retaken he is subject to summary punishment (*peines disciplinaires*) or to a stricter surveillance. If after having escaped he is again made prisoner, he is not liable to any punishment for his previous escape."

2. The *American Regulations* of 1863 lay down on this subject:

"*Art.* 77. A prisoner of war who escapes may be shot or otherwise killed in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape.

3. "If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authority of the captors, whether in union with their fellow-prisoners or other persons.

4. "*Art.* 78. If prisoners of war, having given no pledge, nor made any promise on their honour, forcibly or otherwise escape, and are captured again in battle, after having rejoined their own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement."

5. The *French Manual* of 1884 states:—"If the prisoner is surprised during his flight, force is permissible against him; but recourse to arms should always be preceded by a summons, and the fugitive should not be fired upon until called on to stop and surrender. If the prisoner is recaptured before having joined his own army, or quitted his enemy's territory, he can only be subjected to a disciplinary punishment, and submitted for the future to a more rigorous surveillance. A prisoner who succeeds in escaping and rejoining his army, by passing over territory not occupied, or a neutral country, is subject to no punishment if he is again captured, but special measures may be taken to prevent his escaping again."

RELEASE OF PRISONERS OF WAR BY EXCHANGE OR RANSOM.

45 The ordinary mode of releasing prisoners is by exchange, but this is not obligatory by the Custom of War.

Release may also be obtained by special negotiation, or take place at the conclusion of peace. The Brussels Conference went no further in defining the exchange of prisoners than to lay down that it is regulated by mutual agreement between the belligerents. (*Art.* 30.)

A prisoner of war, being a public enemy, is the prisoner of the Government and not of the captor. No ransom can be paid by a prisoner of war to his individual captor, or to any officer in command. The Government alone releases captives according to rules prescribed by itself. (*American Instructions, Art.* 74.)

1. The *American Instructions* lay down also :—
   "*Art.* 105. Exchanges of prisoners take place, number for number, rank for rank, wounded for wounded, with added conditions for added conditions, such, for instance, as not to serve for a certain period.
2. "*Art.* 106. In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior rank as may be agreed upon by cartel, which requires the sanction of the Government, or of the commander of the army in the field.
3. "*Art.* 108. The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or, in urgent cases, of provision, clothing, or other necessaries. Such arrangement, however, requires the sanction of the highest authority.
4. "*Art.* 109. The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it cannot be demanded by either of them. No belligerent is obliged to exchange prisoners of war. A cartel is voidable so soon as either party has violated it.
5. "*Art.* 110. No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken."
6. The *French Manual* of 1884 states :—"That prisoners are usually exchanged according to the length of time they

have been in captivity, without regard to the arm of the service they may belong to. Prisoners of war not included in a cartel of exchange, by reason of the want of prisoners to be exchanged for them, may be sent back in anticipation, under parole not to serve until an arrangement regarding them has been arrived at; they are afterwards included first in the next cartel."

7. An instance showing the difficulties sometimes arising in the exchange of prisoners is quoted by Halleck (ii. 76) as follows:—"In 1810 Great Britain had, confined in prisons, hulks, and guardships, about 50,000 French prisoners of war; while Napoleon had a much less number of English, but probably enough Spanish and Portuguese (allies of England) to more than make up the equality of numbers. He offered to exchange the whole against the whole, or 1000 English and 2000 Spanish and Portuguese for 3000 French. The British negotiators at first insisted upon the exchange being confined to French and English, but afterwards consented to a general exchange, beginning with the English for an equal number of Frenchmen. Napoleon would not agree to this, fearing, he said, that as soon as the English got back their own countrymen they would find some excuse for not carrying the exchange further, and retain the remainder of the French in the hulks for ever. The negotiations were, therefore, broken off."

8. General Halleck remarks of this:—"That both parties had a legal right to decline the exchange cannot be denied; and the subsequent attempts of each to cast odium upon the other for refusing its own proposition was unbecoming the character of two great nations. Napoleon's proposition was in accordance with the usages of war in such cases, and not unreasonable in itself; moreover, by the same code England was bound to provide for the exchange of her allies who had been made prisoners in the common cause. But if she believed that she would, by the proposed arrangement, lose more than she gained in relative power, she had an undoubted right to decline its acceptance. And certainly Napoleon had good reasons for declining the arrangement proposed to him by Great Britain."

CARTELS.

46 A cartel is an agreement between belligerents for the exchange or ransom of prisoners of war. Both belligerents are bound to faithfully observe such compacts, and a cartel party sent under a flag of truce to carry into execution the provisions of a cartel is equally under the protection of both. By the modern usage of nations, commissaries are permitted to reside in the respective belligerent countries, to negotiate and carry into effect the arrangements necessary for this object. Exact reciprocity is usually observed in cartels of exchange.

1. "Whoever makes a just war has a right, if he thinks proper, to detain his prisoners till the end of the war. If a nation finds a considerable advantage in leaving its soldiers prisoners with the enemy during the war rather than exchange them, it may certainly, unless bound by cartel, act as is most agreeable to its interests. This would be the case of a State abounding in men, and at war with a nation more formidable by the courage than the number of its soldiers." (*Vattel.*)
2. Although the rules of international law do not oblige any State to enter into a cartel for the exchange of prisoners of war, there is a strong moral duty to provide for the release of such of its citizens and allies as have fallen into the hands of the enemy. This is a care which the State owes to those who have exposed themselves in her defence.
3. The *American Instructions* of 1863 state (*Art.* 109):—

   "The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded it cannot be demanded by either of them. No belligerent is obliged to exchange prisoners of war. A cartel is voidable as soon as either party has violated it."

RELEASE OF PRISONERS ON PAROLE.

47 Prisoners of war may be released from captivity, under certain circumstances, also by parole. Release by exchange is the general rule, release by parole is the exception.

The term parole designates the pledge of individual good faith and honour to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor. The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within the captor's country or territory, on conditions stated in the parole.

48 The usual pledge is not to serve during the existing war, but this only extends to active service against the enemy. Parole is a voluntary compact, which the captor is not obliged to offer, nor the prisoner to accept. To avoid misunderstanding, a list of the names of the officers and men paroled should always be made out in writing and accurately kept. A prisoner of war cannot pledge himself *never* again to serve against the enemy; the time must be limited, and the pledge given must be according to the laws of his own country. If the prisoner makes an engagement by which he is released, but which is not approved by his own Government, he is bound to return and surrender himself to the enemy as a prisoner.

49 An officer, as a general rule, has authority to give parole on behalf of himself and those under his command, but an inferior officer should only give such parole with the sanction of a superior officer, if such be within reach. A

soldier, by English practice, can only give parole through a commissioned officer.

50 The *French Regulations* (*Decree of October 13th*, 1863, *Art.* 256) order that French officers are not to separate their lot from that of their men by accepting parole without them. Infractions of this order by commandants during the Franco-German War were blamed by the Council of Inquiry afterwards assembled.

By the Laws of War a State cannot force its subjects to act contrary to their parole; if it has been wrongly given its validity should be admitted, the individual who gave it being punished.

The violation of parole is punishable by death, but usually severe and strict confinement only is inflicted.

"Parole is a contract to be strictly interpreted; the prisoner is bound to no more than its exact conditions. It rests with the captor to state these conditions precisely, and to determine exactly the acts forbidden to the prisoners after their release." (*French Manual*, p. 78.)

1. The *American Regulations* lay down:—
   "*Art.* 124. Breaking the parole is punished with death when the person breaking the parole is captured again. Accurate lists, therefore, of the paroled persons must be kept by the belligerents.
2. "*Art.* 125. When paroles are given and received, there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.
3. "*Art.* 127. No non-commissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individual giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands,

have suffered long confinement without the possibility of being paroled through an officer.

4. "*Art.* 128. No paroling on the battlefield; no paroling of entire bodies of troops after a battle; and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted, or of any value.

5. "*Art.* 130. The usual pledge given in the parole is not to serve during the existing war, unless exchanged. This pledge refers only to the active service in the field against the paroling belligerent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting, or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be employed.

6. "*Art.* 132. A belligerent Government may declare, by a general order, whether it will allow paroling, and on what conditions it will allow it. Such order is communicated to the enemy."

7. The Brussels Conference of 1874 laid down on this subject:—

"*Art.* 31. Prisoners of war may be released on parole if the laws of their country allow of it, and in such a case they are bound on their personal honour to fulfil scrupulously, as regards their own Government, as well as that which made them prisoners, the engagements they have undertaken."

In the same case, their own Government should neither demand nor accept from them any service contrary to their parole.

8. "*Art.* 32. A prisoner of war cannot be forced to accept release on parole, nor is the enemy's Government obliged to comply with the request of a prisoner claiming to be released on parole.

9. "*Art.* 33. Every prisoner of war liberated on parole, and retaken carrying arms against the Government to which he had pledged his honour, may be deprived of the rights

accorded to prisoners of war, and may be brought before the tribunals."

INTERNMENT IN A NEUTRAL COUNTRY.

51 It sometimes happens that, to escape from the enemy, isolated combatants or even bodies of troops still organized pass into the territory of a neutral power.

Obliged to cease pursuit at the frontier, the enemy would have just cause of complaint if the fugitives could, after re-forming on the neutral territory, repair to the theatre of war, or return by another road to put themselves at the disposal of their Government. Consequently the neutral power has both the duty and the right to retain them until the close of the war.

On their arrival they are subjected to internment, that is to say, they are disarmed, limited to a fixed abode, and sufficiently guarded to prevent flight. Generally they are placed at a distance from the frontier, and united by groups in a camp, fort, or any other depôt that can be appropriated for their destination. (*French Manual*, p. 81.)

1. The neutral has the power necessary to assume the guarding and submission of the interned, who must answer before a competent jurisdiction for infraction of the local laws, or against the rules issued for their guidance. When a belligerent takes refuge in neutral territory, the combatant enemies that he has captured and brought with him instantly cease to be his prisoners, but may be interned and retained by the neutral until the end of the war.
2. The neutral State is bound, in the first instance, to provide for the maintenance of the interned, but may recover the amount expended subsequently.
3. To allow the passage of convoys of wounded through neutral territory would in some cases be prejudicial to one of the belligerents, as affording aid to his adversary. The

assent of both belligerents must therefore be obtained before this is permitted.

The clauses of the Convention of Geneva are, in general, applicable to wounded and sick interned in neutral territory; but the Government of the country reserves the right of suspending or restraining their effect if the rules of neutrality oblige them. (*French Manual*, p. 82.)

4. The Brussels Conference of 1874 laid down on this subject:—

"*Art.* 53. The neutral State receiving in its territory troops belonging to the belligerent armies, will intern them, so far as it may be possible, away from the theatre of war. They may be kept in camps, or even confined in fortresses, or in places appropriated to this purpose. It will decide whether the officers may be released on giving their parole not to quit the neutral territory without authority.

5. "*Art.* 54. In default of a special agreement, the neutral State which receives the belligerent troops will furnish the interned with provisions, clothing, and such aid as humanity demands. The expenses incurred by the internment will be made good at the conclusion of peace.

6. "*Art.* 55. The neutral State may authorize the transport across its territory of the wounded and sick belonging to the belligerent armies, provided that the trains which convey them do not carry either the *personnel* or *materiel* of war. In this case the neutral State is bound to take the measures necessary for the safety and control of the operations.

7. "*Art.* 56. The Convention of Geneva is applicable to the sick and wounded interned on neutral territory."

8. During the Conference the question was raised by the Netherlands delegates whether a neutral Government is under any obligation to either of the belligerents with regard to prisoners of war who may escape into the neutral territory. No conclusion was arrived at, but Sir Alfred Horsford reported the military opinion to be, that if a belligerent is unable to take care of his own prisoners, it is not the duty of the neutral Government to do so for him. (*Blue Book*, p. 17.)

IRREGULAR COMBATANTS.

52 Although it is the first duty of a citizen to defend his country, this defence must be conducted according to the Laws of War. The enemy should be able to distinguish between the armed force and the general population. War must also be conducted by persons under the control of some recognized Government. Persons fighting not wearing uniforms, or some conspicuous dress or fixed mark, showing them to be part of an organized military body, incur a risk of being treated as marauders.

On the other hand, when a town is attacked all the inhabitants of the town should be considered as legitimate enemies until the town is taken. The population of a territory not yet occupied by an enemy, when rising *en masse*, if in organized bodies, are entitled to be treated as lawful belligerents.

1. The discussion on this subject at the Brussels Conference was prolonged, and was thus summarized by Sir Alfred Horsford in his report to Lord Derby.

   The two really important and practical questions discussed were :—

   (1) *The definition and nature of occupation.*

   (2) *The rights of defence possessed by the inhabitants of an invaded country.*

   On these points two views, diametrically opposite, were taken. The first, supported by the delegates of Belgium, the Netherlands, Spain, Portugal, Switzerland, and others, was to the effect that an invaded country cannot be in any way restricted as to the sources whence it may draw its means of defence, and that it may have recourse to every aid that patriotism may proffer or suggest.

2. The German delegate, General von Voigts-Rhetz, urged that it is expedient in the interests of humanity that no encouragement should be given to the inhabitants of an occupied district to rise against the invader, as such a

course would lead to repressive measures which, instead of diminishing the horrors of war, would tend to increase them. The Russian delegate, Baron Jomini, observed that if unlimited rights were given to the defender, they must be equally given to the invader, in which case the weaker side would have the disadvantage.

3. The Netherlands delegate, M. de Lansberge, was of opinion that no country could possibly admit that if the population of a *de facto* occupied district should rise in arms against the established authority they should be subjected to the laws in force in the occupying army. He admitted that in time of war necessity might occasionally force the occupier to treat with rigour a population who might rise, and that on account of its weakness the population would be forced to submit. But the idea of delivering over, in advance, to the justice of the enemy those men who, from patriotic motives and at their own peril, expose themselves to all the dangers consequent upon a rising, is, he remarked, one which no Government would dare to entertain.

4. The Belgian delegate, Baron Lambermont, speaking in the same sense, concluded by saying, that if citizens were to be sacrificed for having attempted to defend their country at the risk of their lives, they need not find inscribed on the post, at the foot of which they were to be shot, the Article of a Treaty signed by their own Government, which had in advance condemned them to death.

5. The Swiss delegate, Colonel Hammer, openly declared that two questions diametrically opposed to each other were before the Conference: the maxims and interests, on the one hand, of great armies in an enemy's country, who imperatively demand security for their communications and for the *rayon* of their occupation; and, on the other hand, the principles of war and the interests of the invaded, which cannot admit that a population should be handed over as criminals to justice for having taken up arms against the enemy. He observed that a reconciliation of these two interests was not possible in the case of a *levée en masse* in an occupied country.

6. In reply to the argument that it was undesirable in the

interests of the inhabitants of the occupied country themselves that they should be encouraged to rise, it was evidently felt that it was better to forego any advantage to be purchased at the price of giving up the right to unrestricted defence. The Netherlands delegate observed:—"There is a danger, no doubt, in counselling populations to rise, but they cannot be forbidden to do so. The right to rise must remain intact. If the inhabitants suffer from the consequences of their rising they will only have themselves to blame." (*Blue Book*, p. 237.)

53 When a Government has been overthrown, the absence of a recognized Government does not disentitle organized bodies of men, distinguishable as foes, and fighting according to the customs of war against a foreign enemy, from being treated as lawful belligerents.

The principle to be observed is, that every combatant shall be clearly recognizable by the enemy at a reasonable distance as an enemy, and the distinctive mark by which he is so known shall be fixed, and not capable of easy removal at short notice.

The *French Manual* of 1884 states (p. 31):—"The existing Laws of War do not allow the faith of the adversary to be imposed upon by a person passing at one moment for a peaceable inhabitant claiming protection, at another for an enemy who must be fought. It is consequently forbidden, on pain of losing the privileges of a belligerent, to conceal when convenient the character of a combatant."

1. The *American Instructions* lay down on this point:—
   "*Art.* 81. Partisans are soldiers *armed and wearing the uniform of their army*, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.
2. "*Art.* 82. Men, or squads of men, who commit hostilities,

whether by fighting or inroads for destruction or plunder, or by raids of any kind, *without commission*, without being part and portion of the organized hostile army, and without sharing continually in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers; such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

3. "*Art.* 84. Armed prowlers, by whatever names they may be called, or persons of the enemy's territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

4. Partisan and guerilla troops are bands of men, self-organized and self-controlled, who carry on war against the public enemy without being under the direct authority of the State. They have no commissions or enlistments, nor are they enrolled as any part of the military force of the State, which is, therefore, only indirectly responsible for their acts. The hostile acts of such individuals, or bands of men, *without the authority and sanction of their own Government*, are not legitimate acts of war, and therefore are punishable according to the nature or character of the offence committed. (*Halleck*, ii. 6.)

5. The hostile acts of individuals, or of bands of men *without the authority or sanction of their own Government*, are not legitimate acts of war, and therefore are punishable according to the nature or character of the offence committed. The taking of property by such forces, in offensive hostilities, is not a belligerent act authorized by the law of nations, but a *robbery*. So also the killing of an enemy by such forces, except in self-defence, is not an act of war, but a *murder*. (*Halleck*, ii. 7.)

6. In the case of a levy *en masse*, the inhabitants are organized and armed under the direction of the public

authorities, and the State is directly responsible for their acts. They have, therefore, become a legitimate part of the army.

Art. 10 of the Brussels Conference of 1874 lays down: "The population of a non-occupied territory who, on the approach of the enemy, of their own accord take up arms to resist the invading troops, without having had time to organize themselves in conformity with *Art.* 9, shall be considered as belligerents, if they respect the Laws and Customs of War."

7. In 1870 the Prussians required each French franc-tireur to wear a uniform recognizable at gunshot distance, and the distinctive marks of such uniform to be inseparable from his person. In this case he would be treated as an enemy at war. The corps of franc-tireurs latterly had papers showing that they were in the Government service; their officers held commissions, and their military character was admitted.
8. The French generals in the Peninsular War often punished alike all Spanish peasants found bearing arms, whether or not under the authority and direction of their own Government.
9. When the French peasants carried on a partisan warfare against Wellington's army in France in 1814, he issued a proclamation calling upon them to take up arms openly and join Soult, or stay peaceably at home, declaring he would otherwise burn their villages and hang all the inhabitants.
10. The German governors in 1871 punished with death every one who should take up rails, or place obstacles on the lines of railway, or when the offender could not be discovered, imposed a fine of 1000 thalers on the nearest commune.
11. A notice at St. Michel declared that franc-tireurs, or other persons bearing arms, but not wearing uniforms so as to distinguish them from the civil population, were by the Prussian Laws of War punishable with death. Another notice at Vendresse declared that persons in plain clothes fighting without papers or authorization from their Government would be tried by court-martial, and sentenced to ten years' imprisonment, or, in aggravated cases, executed.

12. The offence of concealing arms or provisions for the enemy, was punished by the United States troops during the Civil War, by sacking and burning any house in an occupied district found to contain such stores. In France in 1870-1, any village in an occupied district harbouring franc-tireurs, or troops of that character, was burnt by the Germans.

13. The German Major-General, Senden, affixed the following proclamation in the department of the Ardennes on December 10th, 1870 :—

"Every individual, not a member of the French army or of the Garde-Mobile, who is found provided with an arm, whether he calls himself a franc-tireur or anything else, the moment that he is seized in an act of hostility towards our troops will be considered as a traitor, and hung or shot without any form of proceeding." A little further on the author of the proclamation added :—"The Mayors of places must warn the commander of the nearest Prussian detachment as soon as the franc-tireurs show themselves in their communes. . . . All houses and villages who give shelter to franc-tireurs, if the Mayor does not give this notice, and from which the troops may be attacked, will be burnt or bombarded." (*General Ambert*, p. 553.)

14. Mr. Farrer quotes some accounts of the terrible severity of the Germans in repressing the French franc-tireurs, taken from a pamphlet published during the war by the International Society for Help to the Wounded, and containing only such facts as were attested by the evidence of official documents or of persons whose position gave them an exceptional title to credit.

"At one place, where twenty-five franc-tireurs had hidden in a wood, and received the Germans with a fusillade, reprisals were carried so far that the *curé*, rushing into the street, seized the Prussian captain by the shoulders, and entreated mercy for the women and children. 'No mercy' was the only reply. At another place twenty-six young men had joined the franc-tireurs ; the Baden troops took and shot their fathers. At Nemours, where a body of Uhlans had been surprised and captured by some Mobiles, the floors and furniture of several houses were first saturated

with petroleum and then fired with shells." (*Farrer*, p. 116.)

15. It must be admitted that considerable provocation had been given to the Germans; for instance, on one occasion twenty-five franc-tireurs dressed themselves in Prussian uniforms, and by the help of that disguise killed several Prussians at Sennegy, near Troyes; and this deed was made a subject of open boast in a French journal. (*Farrer*, p. 126.)

54 The Brussels Conference laid down on this subject:—"The laws, rights, and duties of war are applicable not only to the army, but likewise to militia and corps of volunteers complying with the following conditions:—

(1) That they have at their head a person responsible for his subordinates.

(2) That they carry some settled distinctive badge recognizable at a distance.

(3) That they carry arms openly; and

(4) That, in their operations, they conform to the Laws and Customs of War.

In those countries where the militia form the whole or part of the army, they shall be included under the denomination of army." (*Art.* 9.)

1. General de Leer, second Russian delegate, subsequently defined the meaning attached to the resolutions arrived at on the subject, by his own Government. "The party attacked has the incontestable right of defence without any restrictions whatever. This is a sacred right which our Government has never had any idea of restraining in any manner whatsoever. But co-existing with this right is the duty of the party attacked to act in conformity with the Laws and Usages of War, so as to prevent the struggle becoming savage and barbarous. The duty of the aggressor is to respect national defence as long as that defence is in conformity with the Laws of War, and it is his interest that such defence be regulated in order that he may avoid having recourse to severe measures, which the violation of

the Laws and Usages of War would inevitably compel him to take."

2. The Netherlands delegate, on the part of his Government, declared that in its opinion, observing the Laws of War, does not imply the necessity of any kind of organization whatever, to be exacted by the aggressor from the party attacked, under penalty of the latter not being recognized as a belligerent.

HOSTAGES.

55 A "hostage" is a person accepted as a pledge for the fulfilment of an agreement concluded between belligerents during a war, or in consequence of a war. (*American Instructions, Art.* 54.)

If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit. (*American Instructions, Art.* 55.)

1. Hostages are comparatively rare in the present age; they were, however, used during the Franco-German War. The Mayor of Neufchâtel and his adjunct, for instance, were made hostages for having allowed the arrest of some provision-dealers engaged in supplying the German army. As a rule, where a fine was imposed on a town, and not paid, these two chief officials were kept in custody, or under surveillance, until the money was forthcoming.
2. The capture of important personages and their detention as hostages will always be a good means of checking outrages on prisoners and others, when war is being conducted against uncivilized races who do not know or obey the Laws of War, and under such circumstances would appear to be, wherever feasible, far preferable to direct retaliation.
3. Under the theory of legitimate reprisals, the Germans resuscitated the custom of taking hostages. The French having taken prisoners the captains of some German merchant vessels, the Germans retaliated by taking twenty persons of respectable position at Dijon, and nine at Vesoul, and detaining them as hostages. (*Farrer*, p. 118.)

FUGITIVES AND DESERTERS.

56 Fugitives and deserters when found in the ranks of the enemy are liable to suffer the penalty of death. Vattel says, they are not properly considered as military enemies, nor can they claim to be treated as such; they are perfidious citizens, who have committed an offence against the State, and their enlistment with the enemy cannot obliterate that character, nor exempt them from the punishment they have deserved. They are not protected by any compact of war, as a truce, capitulation, cartel, &c., unless specially and particularly mentioned and provided for. When, however, stipulations of amnesty are introduced into such compacts, in such terms as to include fugitives and deserters by fair and proper intendment, good faith requires that all promises of this kind be honestly and fairly carried into effect. A violation of such agreement is infamous. Amnesties of this nature are very common where the principal war is accompanied with insurrections and civil commotions, involving questions of personal duty and allegiance. (*Halleck*, ii. 93.)

1. The *American Regulations* of 1863 state :—
   "*Art.* 48. Deserters from the American army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture or being delivered up to the American army; and if a deserter from the enemy, having taken service in the army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the Laws and Usages of War requiring redress or retaliation."
2. Any person subject to Military Law who deserts, attempts to desert, or assists others in deserting on active service is liable, on conviction, to suffer death. (*Army Act*, 12, 1.)

SPIES.

57 A spy is a person who is found in a district occupied by the enemy, collecting, *secretly and in disguise*, information respecting his condition and designs, with a view to communicate such information to the opposing force.

An officer or soldier in uniform cannot be treated as a spy. Spies are punishable with death under the Laws of War. No one can be forced to act as a spy as a matter of duty, or against his will.

1. The Brussels Conference of 1874 laid down:—

"*Art.* 19. No one shall be considered as a spy but those who, acting secretly or under false pretences, collect, or try to collect, information in districts occupied by the enemy with the intention of communicating it to the opposing force.

"*Art.* 20. A spy, if taken in the act, shall be tried and treated according to the laws in force in the army which captures him.

"*Art.* 21. If a spy who rejoins the army to which he belongs is subsequently captured by the enemy, he is to be treated as a prisoner of war, and incurs no responsibility for his previous acts.

2. "*Art.* 22. Military men who have penetrated within the zone of operations of the enemy's army, with the intention of collecting information, are not considered as spies if it has been possible to recognize their military character. In like manner, military men (and also non-military persons carrying out their missions openly) charged with the transmission of despatches, either to their own army or to that of the enemy, shall not be considered as spies if captured by the enemy. To this class belong also, if captured, individuals sent in *balloons* to carry despatches, and generally to keep up communications between the different parts of an army or of a territory."

3. The *American Instructions* of 1863 state hanging by the neck to be the punishment for spies, and that no

difference is made by the Laws of War as regards sex in punishing this offence.

4. The *French Manual* (p. 32) points out that the essential characteristic of spies is the disguise of their design; this design being to obtain information for the purpose of communicating it to the enemy. No perfidy, no spy.

   It also says (p. 34), "The Laws of War establish no distinction between the spy who acts from patriotism, and he who spies for the sake of interest, or any other vile object. The extreme punishment is equally applicable to both of them. By the admission of extenuating circumstances, however, the judges have the power of not always applying capital punishment. The law thus enables them not to treat the patriot who risks his life, with the same rigour as the wretch who sells himself for gain."

5. The Prince of Orange, having detected in one of his own secretaries a spy in the service of the Prince of Luxembourg, forced him to write a letter to the latter containing such information as enabled him to effect a march he wished to conceal. (*Farrer*, p. 152.)

6. After the retreat of Washington from Long Island in 1776, Captain Nathan Hale, of the American army, recrossed to that island and entered the British lines in disguise, to obtain information as to their forces and intentions. Being captured while attempting to return, he was executed by Sir William Howe, the English General, as a spy.

7. In 1780, Arnold, the American General commanding the fortress at West Point, was negotiating with Sir Henry Clinton to enable the latter to surprise the place. Major André, who was employed as English agent to carry on these negotiations, was captured while returning from an interview with Arnold in plain clothes. He was tried, and after three months, hung as a spy. Arnold escaped on board a British man-of-war.

8. During the Franco-German War, the correspondents of the *Figaro* and *Gaulois*, French newspapers, were taken at Soulz-les-Forêt by the Prussians. It was suggested that they should be hanged as spies, but they were remitted by the Crown Prince, to be "set free as soon as they can do no harm."

9. The Germans, in 1870, if the French are to be believed, made a free use of spies, and even used their officers for the purpose. The following instances are said to be authentic.

"The day on which Metz capitulated a Prussian officer presented himself in full uniform, in a shop in the town, to pay for some things which he said he had recently bought. The shopkeeper was immensely surprised to recognize in him an individual he had seen in the streets of Metz during the whole siege.

"This officer had, in fact, remained in the town dressed in plain clothes, frequenting the hotels and cafés to which the French officers resorted, entering into conversation with them; and these latter, unfortunately, did not hesitate to relate in public places all they knew, the Prussian officer thus finding out much that he should not have known."

The other example is still more astonishing, showing, on the part of the French, a confidence and a neglect of ordinary precautions hardly to be imagined. "Owing to the small number of French officers able to speak German at the beginning of the war, interpreters had to be provided for commanding officers. Some of these interpreters were said to be German officers, who represented themselves to be political victims driven from their country. The pocket-book of one of them, read by chance, leaves no doubt as to the *rôle* played by this interpreter, who lived on intimate terms with the French officers." (*Lieutenant-Colonel Prevost*, p. 38.)

10. It has been supposed that acting as a spy is necessarily disgraceful; this is an error apparently arising from the fact that the Laws of War have decreed the punishment of death for all spies equally. The reason for this punishment is not, however, the disgraceful nature of the act they commit, but the great danger to the army arising from their presence. As Vattel argues, "A spy may rightly be put to death, because it is the only way we have of guarding against the mischief he may do us."

11. King Alfred in the Danish camp is not looked upon as dishonourably employed, and many other famous soldiers have not hesitated to act as spies. Mr. Farrer quotes several as follows. "Sertorius the Roman was honoured

by Marius with the usual rewards of signal valour for having learnt the language of the Gauls, and gone as a spy amongst them disguised in their dress. The French General Custine entered Mayence in the disguise of a butcher. Catinat spied out the strength of Luxembourg in the costume of a coal-heaver. Montluc entered Perpignan as a cook, and only resolved never again to act as a spy, because the narrowness of his escape convinced him, not that it was a service of too much dishonour, but a service of too much danger." (*Farrer*, p. 145.)

12. To act as a spy in the service of the enemy of one's country for the sake of gain, is of course the extreme of baseness, and disgraceful to the last degree; not, however, because the action is that of a spy, but because it is that of a traitor. On the other hand, for a soldier or a citizen voluntarily to take his life in his hand, and penetrate the enemy's lines in disguise to obtain information essential to his own country, is a service of extreme danger undertaken for the cause of patriotism. Such a deed can be none other than honourable and to be commended, so long as it is considered noble to sacrifice self for country.

13. At the Brussels Conference, the Spanish delegate proposed that the custom of hanging or shooting detected spies should be abolished, and the custom be substituted of interning them as prisoners of war during the continuance of hostilities. The Belgian delegate proposed that in no case should they be put to death without trial, and this should certainly be the rule. It was also sought to establish a distinction, between the deserts of the really patriotic, and the merely mercenary spy. (*Blue Book*, p. 286.)

14. Mr. Farrer considers that men of honour will, in any case, always instinctively shrink from a service which involves falsehood from beginning to end. It may be so, but the shrinking will be caused more by the dread of the disgrace attached to the term spy by custom, than from anything disgraceful in the act itself.

15. It is not probable, nor indeed desirable, that the action of a spy, so full of danger to an army, should be visited with other punishment than death. Regard for justice and

for the nobler feelings of mankind may rightly demand, however, that the death of the brave soldier or devoted patriot should be distinguished from that of the wretch or traitor that spies for gain.

GUIDES.

58 All armies in the field stand in need of guides, and impress them if they cannot obtain them otherwise. This course is sanctioned by the Laws of War. No person having been forced by the enemy to serve as a guide is punishable for having done so.

1. If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war-traitor, and shall suffer death.
2. A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.
3. Guides, when it is clearly proved that they have misled intentionally, may be put to death. (*American Instructions, Arts.* 93—97.)
4. At the Brussels Conference it was proposed by the second delegate of Russia that the following article respecting guides should be inserted :—

"An inhabitant of a country who has 'voluntarily' served as guide to the enemy, is guilty of high treason; he is not, however, liable to punishment from the moment he has been 'compelled' by the enemy to serve in such capacity.

"A guide, even when he has been compelled to serve the enemy, is liable to punishment when he has intentionally pointed out the wrong road." (*Blue Book*, p. 202.)

TRAITORS.

59 Under the Army Act (4, 3), any person subject to Military Law who holds correspondence with, or gives intelligence to, the enemy, or behaves otherwise treacherously, is

liable to death on conviction. Under the Laws of War any British subject so offending is also liable to death as a punishment.

1. The *American Instructions* of 1863 state:—

"*Art.* 89. If a citizen of the United States obtains information in a legitimate manner, and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death.

OBTAINING INFORMATION FROM TRAITORS.

60 Information can be received from traitors; but it appears doubtful whether suborning treachery is justifiable. If the enemy attempts to corrupt the fidelity of an officer, he may feign to be a traitor for the purpose of ensnaring him; but if an officer voluntarily makes overtures to the enemy, under pretence of being a traitor, and then deceives him, such conduct is dishonourable, and contrary to the Custom of War.

1. Vattel's argument on this subject is as follows: It is not contrary to the law of nations to seduce one of the hostile side to turn spy, nor to bribe a governor to deliver a town, because such actions do not, like the use of poison or assassination, strike at the common welfare and safety of mankind. Such actions are the common episodes of every war. But that they are not in themselves honourable or compatible with a good conscience is proved by the fact that generals who resort to such means never boast of them; and, if they are at all excusable, it is only in the case of a very just war—when there is no other way of saving a country from ruin at the hands of lawless conquerors. A sovereign has no right to require the services of a spy from any of his subjects, but he may hold out the temptation of reward to mercenary souls; and if a governor is willing to sell himself and offer us a town for money,

should we scruple to take advantage of his crime, and to get without danger what we have a right to get by force? (*Farrer*, p. 144.)

2. It is evident that there is a great difference between merely receiving the intelligence voluntarily offered for money by traitors, and deliberately seeking to corrupt the integrity of the enemy's officers. The exigencies of war may make the latter desirable, but it can never be other than a dishonourable act.

WAR-TRAITORS.

61 A traitor under the Laws of War, or *war-traitor*, is a person in a place or district under Martial Law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him. The war-traitor is always severely punished. If his offence consists in betraying to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death.

1. If the citizen or subject of a country or place invaded or conquered gives information to his own Government, from which he is separated by the hostile army, or to the army of his Government, he is a war-traitor, and death is the penalty of his offence. (*American Instructions, Arts.* 90—92.)
2. All unauthorized or secret communication with the enemy is considered treasonable by the Laws of War. Foreign residents in an invaded or occupied territory, or foreign visitors in the same, can claim no immunity from this law. They may communicate with foreign parts, or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule. (*American Instructions, Art.* 98.)
3. The *French Manual* of 1884 states:—"In entering the enemy's country, the occupier is naturally led to take

measures necessary for the safety of his army and his military operations; his first care will be to prevent the inhabitants from giving to the authorities of their own army, information as to his forces and their movements. The prohibitions laid down for this purpose result so imperiously from the nature of things, that they cannot be expressed formally. Every inhabitant should know that he exposes himself to be punished if he knowingly commits any act injurious to the invader. If he does so, he acts at his own risk and peril. His motive may be blameless and purely patriotic; the information he gives may have been obtained regularly and without pretence, these facts tell more or less as extenuating circumstances, but from the point of view of the invader, it is perfidious for any person, treated and respected as a non-combatant, to abuse his position to assist clandestinely the hostilities carried on by his own Government. Under the strict Laws of War, the transmission to the enemy of news contrary to the interests of the occupying force is treason punishable with death."

PUNISHMENT OF OFFENDERS AGAINST THE LAWS OF WAR.

62 Offenders against the Laws of War should be tried before a competent tribunal before punishment, especially capital punishment, is inflicted.

By the *French Military Code* spies and similar offenders are to be tried by *conseils de guerre*, equivalent to our courts-martial. "No officer, whatever command he may hold, is authorized to order the summary execution of individuals accused or taken in the act of spying; this would be an abuse of power and a trespass on the domain of justice. It is sufficient to detain them and put them at the disposal of the competent authorities."

1. The *French Manual* of 1884 states (p. 32):—"Many people imagine that, in time of war, a spy taken in the fact can be shot or hung on the spot. This is an error.

The spy cannot be struck or punished without previous trial. Every one knows how easily charges of spying are raised in certain moments. In making it necessary to judge the accused before any execution, the Laws of War prevents the dangers and excesses which often follow excitement based on very little foundation."

2. In the same way a traitor must be tried by a court-martial.
3. At the Brussels Conference General Sir Alfred Horsford, British delegate, proposed that it should be stated, that a spy shall not be punished without having been previously tried. This was supported by the Russian and other delegates, Baron Jomini saying, "The Article proposed is, moreover, a guarantee of humanity. A spy, if captured, shall be tried. If nothing were said about it, he would run the risk of being shot on the spot in the heat of the struggle without his guilt being established." The proposal was not carried out, on the objection of the German delegate that the trial of spies did not appear common to the codes of all nations; and it was laid down by the Conference that they were to be treated according to the laws in force in the army by which they are captured. (*Blue Book*, p. 200.)
4. At the Brussels Conference it was proposed by General Arnandeau, the French delegate, that a common understanding should be arrived at respecting the penalties for crimes, offences, or contraventions committed in violation of international law, such as pillage, robbing inhabitants, violence to the wounded, violation of parole, acts of espionage, continuation of hostilities beyond the time fixed for their cessation; armed assaults; hostilities on neutral territory or that of allies. The proposition was favourably received as one desirable to be settled in the future. (*Blue Book*, p. 313.)

CHAPTER IV.

RESPECTING THE ENEMY'S PROPERTY.

63 The object of war is compensation for injury, which may be held to include the expenses of the war itself. To attain this object it is lawful to take from the enemy everything that conduces to his means of resistance; but it is unlawful to do his property any intentional injury which does not tend to bring the war to an end.

The extreme right of war considers all property of an enemy to be hostile, and subject to seizure; but the law of nations distinguishes not only between the property of the State and that of its individual subjects, but also between that of different classes of subjects, and between different kinds of property of the same subject; and particular rules, derived from usage and the practice of nations, have been established with respect to each. (*Halleck*, ii. 96.)

Under the title of *public property* are included moveable and immoveable property, belonging either to the State, to administrative bodies of civilians, such as departments, districts, communes, &c., or to public establishments consecrated to education, charity, or public worship. To these may be added historical monuments, and works of art or science which do not belong to private individuals.

This, as well as all private property, is protected by a usage distinctly modern, and which forms one of the most important conquests of international right—the forbidding of pillage and plunder. On occupied territory, as at home, the invading troops are bound to respect public and private property. All devastation or wilful damage, not justified by the objects of the war, is an offence that the military authorities should prevent and repress. War only authorizes those injuries which are necessary to bring the enemy to submission. (*French Manual*, p. 113.)

PROPERTY OF THE STATE.

64 A distinction is drawn between personal or moveable property, and immoveable or real property.

All implements of war, military and naval stores, and in general all moveable property belonging to the hostile State, is subject to be seized and appropriated to the use of the captor.

A belligerent who makes himself master of the provinces, towns, public lands, buildings, &c., of an enemy, has a perfect right to their possession and use; but his ownership or dominion is not complete until his conquest is confirmed in some one of the modes prescribed by international procedure. In other words, the possession of real property by a belligerent gives him a right to its *use* and to its *products*, but not a completely valid and indefeasible title, with full power of alienation. As real property remains after the war is over, and may then revert to its former owner on the evacuation of the territory, any alienation of it by the conqueror must be subject to this contingency.

1. *Immoveable property.* Military occupation does not transfer the ownership of the immoveable property of the State

to the invader, or give him the right to dispose of it definitely; it only gives him the power of using it, and imposes on him the corresponding obligation of its maintenance and support.

The invader may use the buildings of the hostile State for his troops and administrative services, and may use the products of its estates and gather its rents; but it must be remembered that the Government of the country when restored will recognize the force of no contracts entered into during occupation and not then executed. Property devoted to public worship, charity, education, and the arts and sciences are specially considered. See *Property Protected by the Law of War.* (*French Manual*, p. 114.)

The occupying State shall only consider itself in the light of an administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile State, and situated in the occupied territory. It is bound to protect these properties (*fonds de ces propriétés*), and to administer them according to the law of usufruct. (*Brussels Conference*, *Art.* 7.)

2. *Moveable Property.* All the moveable property of the State, which can assist the operation of the war, can be seized by the occupier without any indemnity. The occupier can seize all funds belonging to the Government, but funds belonging to private persons or associations, and deposited in public keeping, such as savings or pension funds, should be protected. (*French Manual*, p. 117.)

The army of occupation shall only levy such taxes, duties, and tolls as are already estabished for the benefit of the State, or their equivalent if it be impossible to collect them; and this shall be done as far as possible in the form of, and according to, existing practice. It shall devote them to defraying the expenses of the administration of the country to the same extent as was obligatory in the legal Government. (*Brussels Conference*, *Art.* 5.)

The army occupying a territory shall take possession only of the specie, the funds, and marketable securities,

&c. (*valeurs exigibles*), which are the property of the State in its own right, the depôts of arms, means of transport, magazines and supplies, and in general all the personal property of the State which is of a nature to aid in carrying on the war. (*Brussels Conference, Art.* 6.)

OTHER PUBLIC PROPERTY.

3. The property of parishes or other administrative bodies of a civil nature should be treated by the occupier as private property.

The property of parishes (*communes*), of establishments devoted to religion, charity, education, arts and sciences, although belonging to the State, shall be treated as private property. (*Ibid., Art.* 8.)

4. When the Prussians occupied Dieppe in December, 1870, a tobacco manufactory was there which belonged to the State, tobacco being a State-monopoly in France. General von Goeben explained to the municipality that, as State property, this tobacco manufactory in the occupation of the town became German property, and as he could not work it or carry it away, and did not wish to burn it, he would sell it to the town. This was ultimately done, the price being 75,000 francs, part money down, the rest in a day or two. (*Franco-Prussian War*, ii. 212.)

PRIVATE PROPERTY

65 The general theory of war is, that all private property may be taken by the conqueror; and such was the ancient practice. Modern usage, however, is not to touch private property on land without making compensation, except in certain specified cases.

These exceptions may be stated under three general heads:

(1) Confiscations or seizures by way of penalty for military offences.

If an individual be guilty of conduct in violation of the

Laws of War, his private property may be seized and confiscated. Where the individuals offending can be discovered and secured, the punishment should fall on them only; but if they cannot be discovered, or are not given up, a contribution may be imposed on the authorities, which they must raise by a tax levied on their constituents. (*Halleck*, ii. 109.)

(2) Forced contributions for the support of the invading armies, or as an indemnity for the expenses of maintaining order, and affording protection to the conquered inhabitants.

The Laws of War give the right to make the enemy's country contribute to the expenses of the war, and this may best be done by forced requisitions, which avoid the evil consequences of authorized pillage by the troops themselves. (*Halleck*, ii. 109—114.)

This subject is more fully treated under the head of *Requisitions and Contributions.*

(3) Property taken from the enemy on the field of battle, in the operations of a siege, or in the storming of a place which refuses to capitulate, is usually regarded as legitimate spoils of war; but this must be distinguished from the sacking of private houses or the promiscuous pillage of private property. (*Halleck*, ii. 114.)

1. With regard to war material and other descriptions of private property which are specially adapted to aid the warlike operations of the occupying army, the Brussels Conference laid down:—"Railway plant, land telegraphs, steam and other vessels, not included in cases regulated by maritime law, as well as depôts of arms, and generally every kind of munitions of war, although belonging to companies or to private individuals, are to be considered equally as means of a nature to aid in carrying on a war, which cannot be left by the army of occupation at the disposal of the enemy. Railway plant, land telegraphs, as

well as the steam and other vessels above-mentioned, shall be restored, and indemnities be regulated on the conclusion of peace." (*Art.* 6.)

The original proposal placed by Russia before the Brussels Conference on this subject was:—"The troops should respect private property in the country occupied, and not destroy it without urgent necessity." For this was substituted—

"*Art.* 39. Pillage is expressly forbidden." The principle of respecting private property is, however, acknowledged in *Art.* 40, which begins, "As private property should be respected."

2. The *American Instructions* of 1863 state:—

"*Art.* 37. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality, *strictly private property;* the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offences to the contrary shall be rigorously punished. This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, land, boats or ships, and churches, for temporary and military uses.

3. "*Art.* 38. Private property, unless forfeited by crimes or by offences of the owner, can be seized only by way of military necessity, for the support or other benefit of the army, or of the United States. If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity."

Under Art. 44, "All destruction of property not commanded by the authorized officer, all pillage or sacking, even after taking a place by main force," are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence."

4. The *French Manual* of 1884 says (p. 120):

"Taken in a strict sense, the obligation of respecting private property is incompatible with war; there is not a military operation, a movement of troops, or an engagement, which does not entail damage to the property of a certain

number of persons. But the invader should endeavour to restrain it and to abstain from all damage which is not necessary.

"If the occupation is prolonged, it is also his duty to give certificates of the actual harm done, so that private individuals whose property has suffered may have the means of claiming a share of such compensation as may afterwards be given. On the enemy's territory, as at home, the soldier should commit no act of useless destruction. Marauding is no longer tolerated. Robbery and all crimes against property are criminal, and punishable as in times of peace. It matters little whether private property is or is not protected by the presence of the master. A house is not given up to spoil because the inhabitants have fled before the enemy, and the objects shut up in it are not abandoned to the mercy of the invaders. The soldier who discovers and appropriates valuables hidden by the inhabitants, commits a robbery; his duty is to give them up to the military authority, who will ensure their restoration to the proprietors.

5. During the latter part of the war of 1870-1, the Germans appear to have paid but little respect to private property. Mr. Farrer writes:—"The usual forced military contributions, which the victors exacted, did not exclude a system of pillage and devastation that the present age fondly believed to belong only to a past state of warfare. On December 5th, 1870, a German soldier wrote to the *Cologne Gazette*:—'Since the war has entered upon its present stage, it is a real life of brigands we lead. For four weeks we have passed through districts entirely ravaged; the last eight days we have passed through towns and villages where there was absolutely nothing left to take.' Nor was plunder only the work of the common military serfs or conscripts, whose miserable poverty might have served as an excuse, but it was conducted by officers of the highest rank, who for their own benefit robbed farms and stables of their sheep and horses, and sacked country houses of their works of art, their plate, and even of their ladies' jewels." The authority for this statement is given as the "*Recueil de Documents sur les exactions, &c. en France*," published

by the International Society for Help to the Wounded, pp. 33—37, and Lady Bloomfield's *Reminiscences*, ii. 238, 8, 9. (*Farrer*, p. 119.)

PROPERTY PROTECTED BY THE LAWS OF WAR.

66 The wilful destruction of museums, churches, or of objects of art is now condemned by civilized nations. In the same way archives, historical documents, records, &c. may be used by the invader, but their removal is considered barbarous.

The taking away of scientific objects, pictures, sculptures, &c. belonging to the public, although it has been repeatedly carried out, is against the principle of the Laws of War, as their possession does not increase the enemy's power of resistance.

The *French Manual* of 1884 lays down, that all property devoted to religion, education, science, or art should be respected even more than private property. "Not only do the Laws of War forbid the invader to appropriate them, but they place them under his special protection, and impose on him the obligation to preserve them from injury.

1. The Brussels Conference laid down in *Art.* 8 :—
   "The property of establishments devoted to religion, charity, education, arts and sciences, although belonging to the State, shall be treated as private property. Every seizure, destruction of, or wilful damage to, such establishments, historical monuments, or works of art or of science, should be prosecuted by the competent authorities."
2. The *American Instructions* of 1863 state on this subject :—
   "*Art.* 34. As a general rule, the property belonging to churches, to hospitals, or other establishments of education, or foundations for the promotion of knowledge,—whether public schools, universities, academies of learning, or observatories, museums of the fine arts, or of a scientific

character,—is not to be considered public property liable to seizure, but it may be taxed or used when the public service may require it.

3. "*Art.* 35. Classical works of art, libraries, scientific collections, or precious instruments such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.
4. "*Art.* 36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or Government can be removed without injury, the ruler of the conquering State or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace. In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured."
5. On March 7th, 1814, when in France, the Duke of Wellington in a general order directs "that the churches may not be used by the troops without the permission of the inhabitants and clergy, and that when they are used, the utmost care should be taken of the sacred vessels, and of every article that serves for religious purposes."
6. On the other hand, at the discussion at the Brussels Conference of 1874, General von Voigts-Rhetz, the first German delegate, would not agree to a clause limiting the use of churches, but said,—"An army has urgent wants, which must be satisfied without delay. Quartering troops in a church, or taking what is necessary for their subsistence, even from the property of ecclesiastical establishments, could not, in winter, or in the case of scarcity of provisions, be given up. (*Blue Book*, p. 292.)

REQUISITIONS AND CONTRIBUTIONS.

67 The stern rule that war can be made to support war is undoubtedly admitted by the Custom of War; the question whether this rule should be enforced is one of expediency.

The same holds good as to contributions of money levied on a town or district. An invading army has the unquestionable right to draw its supplies from the enemy without paying for them, and to require contributions for its support.

Requisitions are frequently made use of, and on the principles of civilized warfare may be either—

(1) To provide supplies without payment.

(2) To provide supplies at a moderate cost, not enhanced by the war or occupation.

(3) To provide supplies on payment of the price demanded.

The collection of supplies, or contributions in goods or money, should be conducted under the orders of the Commander of the army for the use of the troops. No private looting or pillage should be permitted.

68 Requisitions for personal service are also permissible. During the course of his military operations the invader has need of information for his marches, means of transport for his material, and hands to help in urgent work.

The Laws of War authorise him to requisition guides, drivers, and workmen among the inhabitants of the occupied territory; but modern usage does not permit him to force the inhabitants to do acts directly hostile to their own country, nor to expose impressed citizens of the hostile nation to the same dangers as combatants, such as in throwing up trenches, or acting as drivers in the field of battle. As a rule, all commanders of corps or of detached bodies have authority to requisition the personal services of the inhabitants.

The payment for the services rendered will be agreed on with the individuals impressed, or an equitable indemnity will at least be offered to them. In every case, if they desire it, a certificate should be given them stating the nature of the services required from them; as this will enable them

afterwards to free them from responsibility, and prove that they acted under constraint. (*French Manual*, pp. 110—112.)

1. As regards the authority who should make the requisition, the *French Ordonnance* of the 3rd May, 1832, for the service of armies in the field, lays down:—"Generals commanding-in-chief and commanders of army corps have alone the power of imposing contributions in money or kind from an occupied territory. No other general can use this resource without a written authority from the Commander-in-Chief."

   The *French Manual* of 1884 (p. 125) remarks on this: "By this means, it is thought, the Commander-in-Chief will be able to appreciate more exactly the real needs of his troops and the resources of the country; he is also more capable of judgment and moderation than subordinate authorities, whose view is less elevated and responsibility less heavy."

2. As regards the receipts given for requisitions the *French Manual* says (p. 126):—"This receipt does not imply a recognition of indebtedness on the part of the invader, nor any intention on his part of indemnifying the bearer; the compensation for wrong caused by requisition is a question whose settlement is postponed until after the war, and left either to the negotiators of the peace or to the legislature of the country occupied.

   "The receipt delivered is a document which states the nature of goods supplied, and helps those impressed on, to participate later on in the measures of compensation taken in favour of the victims of the war. For this purpose the receipt should be of such a character as to enable its authenticity to be verified and the value of the goods established. The officers who give them should see that they are legible, state precisely the points necessary to determine the value of the goods, mark the date, and add their signature, with their rank and corps, noting if they act by order of a superior authority. The obligation to give receipts presents the additional advantage for the population, that the invader having to leave a written

record of his demands, commits less abuse and acts with greater moderation."

3. The Brussels Conference of 1874 declared on this subject:—

"*Art.* 40. As private property should be respected, the enemy will demand from parishes or communes, or the inhabitants, only such payments and services as are connected with the necessities of war, generally acknowledged in proportion to the resources of the country, and which do not imply, with regard to the inhabitants, the obligation of taking part in the operations of war against their own country.

4. "*Art.* 41.—The enemy, in levying contributions, whether as equivalents for taxes, or for payments which should be made in kind, or as fines, will proceed, as far as possible, according to the rules of the distribution and assessment of the taxes in force in the occupied territory. The civil authorities of the legal Government will afford their assistance if they have remained in office. Contributions can be imposed only on the order and on the responsibility of the General-in-Chief, or of the superior civil authority established by the enemy in the occupied territory. For every contribution a receipt shall be given to the person furnishing it.

"*Art.* 42. Requisitions shall be made only by the authority of the commandant of the locality occupied. For every requisition an indemnity shall be granted or a receipt given."

The discussion at the Conference as to these receipts, showed clearly, that payment for them could only be arranged for in the treaty of peace concluding the war, or by the country occupied paying for them to indemnify the holders. (*Blue Book*, p. 278.)

5. The *American Instructions* of 1863 maintain the right of a victorious invader "to levy forced loans, billet soldiers, or to appropriate property, especially houses, land, boats or ships, and churches for temporary and military uses. Private property, unless forfeited by crimes or by offences of the owner, can be seized only by way of military necessity, for the support or other benefit of the army of the

United States. If the owner has not fled, the commanding officer will cause receipts to be given which may serve the spoliated owner to obtain indemnity." (*Arts.* 37, 38.)

69 Writing on this subject, Halleck says,—"We have a right to make the enemy's country contribute to the expenses of the war. Troops in the enemy's country may be subsisted either by regular magazines, by forced requisitions, or by authorized pillage. It is not always politic, or even possible, to provide regular magazines for the entire supplies of an army during the active operations of a campaign. Where this cannot be done the General is obliged either to resort to military requisitions, or to entrust their subsistence to the troops themselves. The inevitable consequences of the latter system are universal pillage, and a total relaxation of discipline; the loss of private property, and the violation of individual rights are usually followed by the massacre of straggling parties, and the ordinary peaceful and non-combatant inhabitants are converted into bitter and implacable enemies. The system is therefore regarded as both impolitic and unjust, and is coming into general disuse among the most civilized nations—at least for the support of the main army. In case of small detachments, where great rapidity of motion is requisite, it sometimes becomes necessary for the troops to procure their subsistence wherever they can. In such a case the seizure of private property becomes a necessary consequence of the military operations, and is, therefore, unavoidable. Other cases of similar character might be mentioned. But even in most of these special and extreme cases, provisions might be made for subsequently compensating the owners for the loss of their property."

Although forced requisitions are permissible, they are objectionable where they can be avoided, as they irritate the inhabitants, and cause them to withhold or even destroy

supplies, thus ultimately making the maintenance of an army extremely difficult.

1. The American General, Scott, when directed by the United States Government to support his troops by forced contributions when operating in Mexico in 1847, wrote :—" If it be expected at Washington, as is now apprehended, that the army is to support itself by forced contributions levied upon the country, we may ruin and exasperate the inhabitants and starve ourselves ; for it is certain they would sooner remove and destroy the products of their farms than allow them to fall into our hands without compensation. Not a ration for man or horse would be brought in except by the bayonet, which would oblige the troops to spread themselves out many leagues to the right and left in search of subsistence, and to stop all military operations."
2. The Duke of Wellington was averse to requisitions, both in the Peninsula and in France. After Waterloo his army received their provisions and forage by requisition in the country, but in every case upon regular receipts by the commissioners attached to his troops, not with the view of paying for what had been received, but in order to avoid abuse and plunder, and to restrict the requisitions to food and forage only—both strictly necessaries.
3. Napoleon I., in order to save France from fresh taxes, levied large requisitions from the enemy. In 1806, after the battle of Jena, he made Prussia pay upwards of £4,000,000. After Suchet's conquest of Valencia in 1812, that country was forced to pay an additional 200,000,000 francs for the use of the army. In Spain, the French troops, for all but their main armies, obtained subsistence mainly by pillage. Napoleon, writing afterwards at St. Helena, attributed most of his disasters to the animosities thus created among the Spanish people.
4. During the Franco-German War, the Prussians, on entering French towns and villages, billeted their troops on the inhabitants, writing in chalk on the door of each house the number of soldiers to be provided for therein. When there was time for doing things in an orderly manner,

requisitions were addressed to the Mayor, and by him given out to private individuals; it was for the person executing the requisition to obtain payment from the Mayor, who generally did pay in whole or part out of the local funds, looking, on behalf of his Commune, to the State for future indemnification. Requisitions were issued for every imaginable thing. Horse-shoes were constantly the object of requisitions, and on the great lines of march blacksmiths were everywhere impressed into the Prussian service. At Elbœuf, Louviers, and other towns a quantity of cloth was requisitioned, boots and socks, and later in the campaign horses were frequently demanded. In theory, nothing was taken unless the demand was in writing, and for which a receipt was not given; but this rule often broke down in practice.

5. While in occupation of Versailles, the Germans daily made requisitions for 120,000 loaves of bread, 80,000 lbs. of meat, 90,000 lbs. of oats, 27,000 lbs. of rice, 7000 lbs. of roasted coffee, 4000 lbs. of salt, 20,000 litres of wine, and 500,000 cigars; other requisitions being made as required.

6. After the supremely gallant defence of Chateaudun, an open town, by 865 French franc-tireurs and 435 National Guards, against a large German force numbering about 7000 men with thirty guns, the town was pillaged and burnt by the Germans. Afterwards General Wittich demanded a war-contribution of 200,000 francs, 1500 blankets, 100 kilogrammes of salt, 100 of coffee, 400 litres of brandy, and 20,000 litres of hay. It was impossible to comply fully with this demand. The Germans gave a receipt for what they took. (*General Ambert*, p. 547.)

In an official declaration by the French Government to the National Assembly made on the 22nd May, 1872, it was stated that besides direct and indirect taxes, the German troops had requisitioned a sum of over 327,000,000 francs. The moveable objects carried away without requisition were valued at over 264,000,000 francs. Parishes and individuals had been spoiled to the amount of 600,000,000 francs, declared and recognized. (*General Ambert*, p. 559.)

8. When the Germans under General von der Tann occupied Orleans on the 13th October, 1870, a contribution of a million francs in specie was levied on the town through the Mayor, which was subsequently reduced to 600,000 francs, and requisition was at the same time made for 600 cattle, 300,000 cigars, and all the horses in the town. The soldiers were billeted on the inhabitants, and the jewellers' and similar shops were strictly respected. (*Franco-Prussian War*, ii. 84.)

9. After the capitulation of Dijon to General Werder on the 30th October, 1870, the latter made a convention with the municipality by which the town was to pay £20,000 as "caution" money, to be afterwards returned if the relations between the victors and the inhabitants remained satisfactory; the German troops, in the mean time, to be boarded and lodged, and all necessaries for the army provided. The German commander engaged, on his part, to make no requisitions except by arrangement between the commissariat and the municipality, and to respect private property. The occupying force was 20,000 strong, with sixty guns. (*Franco-Prussian War*, ii. 174.)

10. The Duke of Wellington was most particular in enforcing regularity in procuring supplies. On 21st November, 1803, in India, in a general order, he orders:—"Grain taken or bargained for in the villages by any department belonging to the army shall be paid for on the spot before the grain is removed; and he warns all persons concerned, that any deviations from this rule will be submitted to a public inquiry."

In France, on March 8th, 1814, he calls attention to orders:—"That requisitions, whether for forage or other articles, should be made by a commissary or a magistrate." Goods were only to be taken on requisition from individuals when the magistrate is absent and cannot be found.

Again, in a general order issued when entering France two days after Waterloo, he directs:—

7. No article is to be taken from any individual, by any officer or soldier, without payment for the same. The Commissaries of the army will supply the troops with all that they require in the usual manner, and no requisi-

tion is to be made direct on the country, or the magistrates, by any officer or soldier.

8. The Commissaries will receive directions, either from the Field-Marshal or from the Generals commanding the troops of the several nations, to make such requisition as may be necessary for the supply of the troops, for which they will give the usual vouchers and receipts, and they will understand that they will be responsible to issue and account for what they will thus receive from the country in France, in the same manner as they would if they purchased supplies from the troops in their own country respectively. (See *Despatches*, pp. 865-6.)

BOOTY OR PRIZE OF WAR.

70 The property, whether public or private, taken from the enemy on the field of battle, in the operations of a siege, or in the storming of a place which refuses to capitulate, is usually regarded as legitimate spoils of war. This does not, by the English law, belong to the troops who actually capture it, but is the property of the Crown. Practically, by custom, it is distributed among the army of which the troops who made the capture form a part.

Individual plundering, or the pillage of a town taken by assault, is barbarous, and contrary to the Laws of War; the proceeds of such property as can be legitimately taken must be distributed as booty among the army at large.

In England no statute exists with respect to military captures, but the proceeds belong to the Crown, and are distributed according to the regulations established by the Crown.

The mode in which the Crown now exercises its jurisdiction respecting booty is to refer the claims of those who petition for a share to the Lords of the Treasury, who lay down the principles which are to govern the case, when a board of trustees is appointed under the royal sign-manual,

to ascertain, collect, and distribute the booty according to the scheme sanctioned by the Crown. No appeal lies from the decision of the Lords Commissioners of the Treasury, but they may hear counsel upon points arising between the claimants and the trustees as to what shall or shall not be considered legal booty. (*Halleck*, ii. 122.)

1. The question of the mode of distributing spoil of war is very ancient. It is first mentioned in the Bible, when Abraham overthrew the kings who had sacked Sodom and Gomorrah and despoiled them of their booty, about 1900 B.C. When David and his 400 men overtook the Amalekites who had plundered Ziklag, about B.C. 1056, and recovered the spoil they had taken, David's decision is pretty much that which is followed now. "As his part that goeth down to the battle, so shall his part be that tarrieth by the stuff: they shall part alike." (1 *Samuel* xxx. 24.)
2. Among the Romans, the soldier was obliged to bring into the public stock all the booty he had taken. This the General caused to be sold, and after distributing a part of the produce of such sale among the soldiers according to their rank, he consigned the residue to the public treasury.
3. In modern times it is the general practice to distribute the proceeds, or at least a part of the proceeds, of captured property among the captors, as a reward for bravery and a stimulusto exertion.

TREATMENT OF PLACES CAPTURED BY ASSAULT.

71 In old days, when a town was carried by assault, the garrison were frequently put to the sword in cold blood on the plea that they had no right to quarter. This is now condemned as barbarous by all civilized nations.

Towns captured have been sacked, and the houses of the inhabitants plundered, on the plea that it was impossible for the General to restrain the soldiers in the confusion and

excitement of storming the place. Such an excuse is utterly untenable; the State which employs the soldiers is responsible that they are amenable to control, and that power is given to the Commander sufficient for the purpose.

The Brussels Conference of 1874 lays down :—

"*Art.* 18. A town taken by storm shall not be given up to the victorious troops to plunder."

The *French Manual* of 1884, says :—"Pillage is always and absolutely forbidden."

The *American Instructions* of 1863 decree the penalty of death against all pillage or outrage, even after taking a place by main force, and permit those to disobey in this respect to be shot summarily.

1. The fair fame of the British Army in the Peninsular War was sullied by the disgraceful scenes which followed the storming of Ciudad Rodrigo, Badajos, and San Sebastian. Sir William Napier scouts the excuse offered that the soldiers were not to be controlled, and ascribed it to the want of strict military law on the subject. The Duke of Wellington frequently complained of the insufficient power he possessed for repressing such disorders, and advocated a stronger provost establishment.
2. The Duke of Wellington declared that, after the storming of a town he found it impossible to prevent plundering, although particular pains were taken to prevent it. After San Sebastian was stormed the Duke wrote in reply to complaints made of the conduct of the soldiers :—"In regard to the plunder of the town by the soldiers, I am the last man who will deny it, because I know that it is true. It has fallen to my lot to take many towns by storm; and I am concerned to add that I never saw or heard of one so taken, by any troops, that it was not plundered. It is one of the evil consequences attending the necessity of storming a town, which every officer laments, not only on account of the evil thereby inflicted on the unfortunate inhabitants, but on account of the

injury it does to discipline, and the risk which is incurred of the loss of all the advantages of victory, at the very moment they are gained."

3. By our present Army Act any soldier who "leaves his commanding officer to go in search of plunder" (*A. A.*, 6, 1, *a*), or "breaks into any house or other place in search of plunder" (*A. A.*, 6, 1, *g*); or "commits any offence against the property or person of any inhabitant" (*A. A.*, 6, 1, *f*), is liable on active service to suffer death on conviction by court-martial. The experience of the Duke of Wellington in the Peninsula was, however, that great difficulty was found in obtaining evidence sufficient to convict by court-martial.
4. It must be remembered that by our existing Military Law the Provost-Marshal has no longer power to inflict punishment, and that the punishment of flogging has been entirely abolished. It will be the duty of the Government to watch closely the effect of these changes on the discipline of British troops in the field, and to be ready to promptly strengthen the hands of our Generals for the maintenance of discipline should it be necessary. No doubt we have now a higher tone of feeling on this subject among both officers and men, but it must not be forgotten that war is a terrible solver of morality.

EVIL EFFECT OF PLUNDERING ON THE TROOPS.

72 This evil cannot be more strongly realized than by reading the despatches of the Duke of Wellington, who had great difficulties to contend with on this point. After the Battle of Vittoria he writes on the 29th June, 1813 :—

1. "We started with the army in the highest order, and up to the day of the battle nothing could get on better; but that event has, as usual, totally annihilated all order and discipline. The soldiers of the army have got among them about a million sterling in money, with the exception of about 100,000 dollars, which were got for the military chest. The night of the battle, instead of being passed in

getting rest and food to prepare them for the pursuit of the following day, was passed by the soldiers in looking for plunder. The consequence was, that they were incapable of marching in pursuit of the enemy, and were totally knocked up. The rain came on and increased their fatigue, and I am quite convinced that we have now out of the ranks double the amount of our loss in the battle; and that we have lost more men in the pursuit than the enemy have; and have never in any one day made more than an ordinary march. This is the consequence of the state of discipline of the British army. We may gain the greatest victories, but we shall do no good until we shall so far alter our system as to force all ranks to perform their duty." (*Selected Despatches*, 787.)

2. On the 11th April, 1810, when writing to the Earl of Liverpool, after noting that several men had lately been executed for plundering, he writes :—" I am still apprehensive of the consequences of trying them in any nice operation before the enemy, for they really forget everything when plunder or wine is within their reach." (*Despatches*, 380.)
3. On the 8th October, 1813, he writes to Lieut.-General Sir J. Hope :—" I have sad accounts of the plunder of the soldiers yesterday, and I propose again to call the attention of the officers to the subject. . . . If we were five times stronger than we are, we could not venture to enter France if we cannot prevent our soldiers from plundering."

CHAPTER V.

INTERCOURSE WITH THE ENEMY.

TREATIES OF PEACE.

73 TREATIES of peace can only be concluded by the sovereign power of a State. In monarchical Governments the treaty-making power is usually vested in the reigning sovereign, subject in some cases to restrictions. In republics it is usually vested in the chief executive, either alone or conjointly with a council or senate.

In order to make a treaty obligatory it is necessary that the person or authority making the treaty had full power for the purpose; that both parties have consented to its conditions freely by their voluntary act; the form of such consent being unimportant, provided it is clearly and fully declared, and that the execution is possible.

The obligations of treaties expire in case either of the contracting parties loses its existence as an independent State, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things.

The general authority to make treaties of peace necessarily implies the power to stipulate the conditions of peace; and among these may properly be involved the cession of the territory and other property of the State, as well as the right of sovereignty over private property.

1. The principal party in whose name a war was made cannot justly make peace without including his allies; each State in alliance makes its own treaty, but it must do so in concert with its allies. If any State, however, should insist on prosecuting the war beyond the object of the original alliance, the others may very properly make peace for themselves.
2. The peace concluded relates to the war which it terminates, and does not allow the belligerents to renew the war for the same cause which gave rise to it. A treaty of peace leaves everything in the state in which it finds it, unless there be some express stipulations to the contrary. The existing state of possession is maintained, except so far as altered by the terms of the treaty. If nothing be said about conquered country or places, they remain with the possessor. (*Halleck*, i., chaps. ix., x.)
3. The following were the terms of the preliminaries of peace signed on the 26th February, 1871, at Versailles, at the close of the Franco-German War, by Count Bismarck and M. Thiers:—

"*Art.* 1. France renounces in favour of the German Empire the following rights:—The fifth part of Lorraine, including Metz and Thionville; and Alsace, less Belfort.

"*Art.* 2. France will pay the sum of five milliards of francs (£200,000,000), of which one milliard is to be paid in 1871, and the remaining four milliards by instalments extending over three years.

"*Art.* 3. The German troops will begin to evacuate the French territory so soon as the treaty is ratified. They will then evacuate the interior of Paris, and some departments lying in the western region. The evacuation of the other departments will take place gradually, after payment of the first milliard, and proportionally to the payment of the other four milliards. Interest at the rate of five per cent. will be paid on the amount remaining due from the date of the ratification of the treaty.

"*Art.* 4. The German troops will not levy any requisitions in the departments occupied by them, but will be maintained at the cost of France.

"*Art.* 5. A delay will be granted to the inhabitants

of the territories annexed to choose between the two nationalities.

"*Art.* 6. Prisoners of war will be immediately set at liberty.

"*Art.* 7. Negotiations for a definitive treaty of peace will be opened at Brussels after the ratification of the treaty.

"*Art.* 8. The administration of the departments occupied by the German troops will be intrusted to French officials, but under the control of the chieftains of the German army of occupation.

"*Art.* 9. The present treaty confers upon the Germans no rights whatever in the portion of territory not occupied.

"*Art.* 10. The treaty will have to be ratified by the National Assembly of France."

GENERAL TRUCE.

74 A general truce puts an end to the war while it is in force, but leaves undecided the questions which gave occasion to it. It applies to the general operations of the war, and extends to all the forces of the belligerent States.

This form of agreement is not now usual. A general truce can only be concluded by the sovereign power of a State. The general meaning of such compacts is, that all things within the theatre of immediate operations shall remain as they were at the moment of the conclusion of the truce.

1. A general truce is not a peace. The war continues, but the *acts of war* are suspended. Truces have been made in former times between Spain and Portugal, and other states equal in power, in order that they might waive no rights by making a peace. (*Halleck*, i. 203 *n.*)

75 During the continuance of a general truce, each party to it may, within his own territories, do whatever he would have a right to do in time of peace, such as repairing or build-

ing fortifications, constructing and fitting out ships, levying and disciplining troops, casting cannon and manufacturing arms, and collecting provisions and munitions of war. He may also move his armies from one part of his territory to another, not occupied by the enemy, and call home, or send abroad upon the ocean, his vessels of war. In the theatre of hostilities, and in the face of the enemy, he may do whatever, under all the circumstances, would be deemed compatible with good faith and the spirit of the agreement.

1. In the case of a truce between the governor of a fortress or fortified town, and the general or admiral investing it, either party is at liberty to do what he could safely have done if hostilities had continued. For example, the besieged may repair his material of war, replenish his magazines, and strengthen his works, if such works were beyond the reach of the enemy at the beginning of the truce, and if the provisions and succours are introduced into the town in a way or through passages which the besieging army could not have prevented. But the besieged cannot construct or repair works of defence if he could not safely have done this in case the hostilities had continued, nor introduce provisions, military munitions, or troops through passages which were occupied or commanded by the enemy at the time of the cessation of hostilities; nor can the besiegers continue works of attack which might have been prevented or interrupted by the besieged. To receive and harbour deserters within the limits of the truce is an act of hostility and a violation of the implied conditions. (*Halleck*, ii. 344.)

ARMISTICE.

76 An armistice, or partial truce, is an agreement for the suspension of hostilities to an extent specified by the parties concerned. It is not a partial or temporary peace.

Every commander of an army is presumed to have power delegated to him to conclude an armistice, but this implied authority extends only to the necessities of warfare. An armistice binds both parties from the date it is concluded, arrangements being generally made to allow time for the troops at distant places to hear of it.

The commencement and close of an armistice should be definitely arranged for; the best form of armistice is from a certain hour on one day to a certain hour on another, signals being given to mark the exact time.

1. The Brussels Conference, 1874, declared :—

"*Art.* 47. An armistice suspends warlike operations by a mutual agreement between the belligerents. Should the duration thereof not be fixed, the belligerents may resume operations at any moment, provided, however, that proper warning be given to the enemy in accordance with the conditions of the armistice.

2. "*Art.* 48. An armistice may be general or local. The former suspends all warlike operations between the belligerents; the latter only those between certain points of the belligerent armies, and within a fixed radius.

3. "*Art.* 49. An armistice should be notified officially and without delay to the competent authorities and to the troops. Hostilities are suspended immediately after the notification.

4. "*Art.* 50. It rests with the contracting parties to define in the clauses of the armistice the relations which shall exist between the population.

5. "*Art.* 51. The violation of the armistice by either of the parties gives to the other the right of terminating it (*le dénoncer*).

"*Art.* 52. The violation of the clauses of the armistice by private individuals, on their own personal initiative, only affords the right of demanding the punishment of the guilty persons, and, if there is occasion for it, an indemnity for losses sustained."

6. The special points noted in the *American Instructions* in

addition to the above are:—"That the armistice must be agreed upon in writing, and be duly ratified by the highest authorities of the contending parties. That if conditions be agreed upon, they should be clearly expressed, and must be rigidly adhered to by both sides." Also—

7. "*Art.* 139. An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are responsible from the day only when they receive official information of its existence.

8. "*Art.* 140. Commanding officers have the right to conclude armistices binding on the district over which their command extends, but such armistice is subject to the ratification of the superior authority, and ceases so soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between giving notice of cessation and the resumption of hostilities should have been stipulated for.

9. "*Art.* 141. It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any. If nothing is stipulated, the intercourse remains suspended, as during actual hostilities.

10. "*Art.* 146. Prisoners taken in the act of breaking an armistice must be treated as prisoners of war, the officer alone being responsible who gives the order for such a violation of an armistice."

11. An armistice was agreed to between the Duke of Wellington, then Major-General Wellesley, and Scindiah, after the battle of Argaum, on the following terms, dated November 30th, 1803:—

"(1) There shall be a cessation of hostilities between the troops commanded by Major-General Wellesley, in the Deccan and in Guzerat, and those in the service of the Maharajah Dowlah Rao Scindiah.

"(2) To prevent accidents, and in order to insure the execution of the first article, it is agreed that there shall be an interval of 20 coss between the different British and allied armies and that of the Maharajah; and the Maharajah will march with his army and take up a position 20

coss to the eastward of Ellichpoor, and he will forage still further to the eastward.

"(3) In case the operations of the British and allied armies against the other enemies of the British Government should draw either of them nearer than 20 coss to the position which the Maharajah will have occupied, according to the second article, previous notice of such operation will be given, in order that the Maharajah may take timely measures always to preserve an interval of 20 coss between his army and the British and allied troops.

"(4) In Guzerat the British troops shall not advance beyond Dohud; those of the Maharajah on the side of Guzerat shall not approach nearer than 20 coss to Dohud.

"(5) Notice must be given in case either of the parties should be desirous of putting an end to this agreement.

"(6) This agreement is to be ratified by the Maharajah Dowlah Rao Scindiah, and his ratification is to be given to Major-General Wellesley in the space of ten days from this time."

The conditions of this suspension was that Scindiah's army should be moved to a position, in the neighbourhood of which it was not probable that the operations of the British troops should carry them for some time. As this condition remained unexecuted, although Scindiah was repeatedly reminded of it, General Wellesley, after giving him notice the day before, attacked and defeated him again.

12. The following are given as normal forms of armistice in the *Manual of Military Law*, p. 882.

FORM OF ARMISTICE (No. 1).

General Armistice between two opposing Forces.

"A. B. ———, authorized by C. D. ———, Commanding-in-Chief Her Britannic Majesty's Forces in ———, and E. F. ———, authorized ——— by G. H. ———, Commanding-in-Chief the——troops in ———, agree to the following articles:—

"*Art.* 1. On publication of this Armistice, hostilities shall cease between the British and ———— forces at all points along the frontier of ————, between ——— and ————

"*Art.* 2. The Armistice shall continue until noon on the —— day of —— and until such further time as is hereinafter mentioned.

"*Art.* 3. Either side may at any time on or after the said —— day of —— give six days' notice of their intention to determine the armistice, and the armistice shall be determined at the expiration of such six days. Notice shall be given by writing, stating the intention to determine the armistice, and sent from the head-quarters of one army to the head-quarters of the other army. In reckoning time for the purpose of the said six days' notice, the day on which the notice is given, at whatever hour the same may be given, shall be reckoned as an entire day, and the armistice shall expire at midnight of the fifth day succeeding the day on which the notice is given.

"*Art.* 4. The following lines of demarcation shall be strictly adhered to during the armistice, that is to say, for the British army ———— and for the ———— army ———— The territory lying between the two lines of demarcation shall be strictly neutral, and any advance into it by any member of either army is prohibited, except for the purposes of communications between the two armies. Neither army shall extend their line in a —— or —— direction beyond the points named as the extremities of their respective lines.

"*Art.* 5. Subject to the restrictions mentioned in the fourth article, as respects making an advance into the neutral territory, either army may take measures to strengthen its position, and may receive re-inforcements and stores of warlike and other material, and may do any other act not being an act of direct hostility.

"*Art.* 6. During the two days following the day on which this armistice is ratified, burial parties from both armies shall be permitted to visit the field of battle of the —— instant, for the purpose of burying the dead.

"*Art.* 7. Two officers of field rank shall be appointed

from each army to meet together without delay at ——— for the purpose of determining the precise course of the lines of demarcation of the two armies, in so far as their precise course is not laid down in Article 4.

"*Art.* 8. During the continuance of the armistices, the peaceful inhabitants of the country shall be allowed to pursue their occupations, and to buy or sell provisions or goods to either army; but any measures consistent with the observance of the articles of the armistice in relation to the neutral territory may be taken by either army to prevent inhabitants, after entering the lines of, or obtaining information respecting one army, from passing or carrying information to the other army.

"*Art.* 9. This armistice shall come into force immediately on its ratification by the Commanders-in-Chief of the two armies, and officers shall be despatched with all speed from the head-quarters of each army to give notice of the armistice at all points along the line."

13. FORM OF ARMISTICE (No. 2).

Between Besieging Force and Garrison.

"A. B., General, Commander-in-Chief of Her Britannic Majesty's Forces now in ———, and C. D., General, Commander-in-Chief of the garrison of ————, agree to the following articles:—

"*Art.* 1. An armistice between the British troops investing ———, and the troops forming the garrison of ———, shall begin at noon on the 15th instant, and shall end at noon on the 29th instant.

"*Art.* 2. White flags shall be hoisted simultaneously at the beginning of the armistice, the one at —— within the British lines, and the other on Fort ———. The flags shall be kept flying during the continuance of the armistice, and shall be lowered simultaneously at its conclusion.

"*Art.* 3. Provisions to the extent of ——— rations shall be supplied daily for the use of the garrison by the besiegers

on payment of such sums as may be agreed upon as the value thereof, by commissioners to be appointed by the above-named Commanders-in-Chief respectively. The provisions shall be delivered to persons authorized to demand the same by the General commanding the garrison, at such times and in such places in front of the British lines as may be agreed upon by the above-named Commanders-in-Chief, and shall be conveyed to the garrison by the persons authorized as above-stated.

"*Art.* 4. Save in so far as is provided by Article 3, or as may be agreed upon between the above-named Commanders-in-Chief, it is agreed that the garrison shall not attempt to obtain succour, and that no communications whatever shall, during the armistice, take place between the garrison and any person outside of the garrison, whether friend or enemy; and a space of ——— around the fortifications shall be considered neutral ground, and no person whatever, whether he be a stranger or belonging to the garrison, or to the besieging army, shall be allowed to enter on such space without the permission of the above-named Commanders-in-Chief.

"*Art.* 5. General ——— commanding the garrison, engages on behalf of the garrison not to repair the fortifications, or to undertake any new siege-works, or do any act or thing whatsoever calculated to place the garrison in a better position in regard to its defence; and General ——— on the behalf of the British troops, engages not to undertake any siege works, or to make any hostile movement against the garrison; but it is understood that he is at liberty to obtain fresh supplies of provisions or reinforcements of troops."

ACTS PERMITTED AND FORBIDDEN DURING ARMISTICE.

77 The acts to be permitted or forbidden during an armistice should be specified in the agreement concluding it. As a general rule, a belligerent cannot take advantage of an armistice to do any aggressive act against the enemy, or any act which, but for the armistice, he could not have done

without danger to himself. This view is considered impracticable by the French, who advocate both parties being left free to act within their own lines. (*See below.*)

The question is so difficult a one, that the greatest caution should be observed, in settling an armistice, to specify the acts which are or are not to be permitted during its continuance.

1. When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this subject that the besieger must cease all extension, perfection, or advance of his attacking works as much so, as from attacks by main force. But as there is a difference of opinion among martial jurists, whether the besieged have the right to repair breaches or to erect new works of defence within the place during an armistice, this point should be determined by express agreement between the parties. (*American Instructions, Art.* 143.)
2. The *French Manual* of 1884 says:—

   "The belligerents should agree exactly on the acts which they will interdict within their positions during the armistice. In default of stipulations to the contrary, each party retains the power of moving his troops within his lines, of raising recruits, constructing intrenchments, repairing breaches, establishing new batteries; in a word, of profiting by the time and means at his disposal to prepare for the resumption of hostilities.
3. According to certain authors, on the contrary, the belligerents should rigorously refrain from every act which the enemy would have an interest in preventing, and which he would probably prevent if not restricted by the armistice. This theory has the capital defect that it is not practicable, leads to abuses and contentions, and has not been followed in recent wars.

SUSPENSION OF ARMS.

78 If the cessation of hostilities agreed upon is only for a very short period, at a particular place, or for a temporary purpose, such as for a parley, a conference, or for removing the wounded and burying the dead after a battle, it is called *a suspension of arms.*

This kind of compact may be formed between the immediate commanders of the opposing forces, and is obligatory upon all persons under their respective commands.

1. "Even commanding officers of detachments may enter into this kind of compact, but such an agreement can only bind the detachment itself; it cannot affect the operations of the main army, or of other troops not under the authority of the officer making it." (*Halleck*, ii. 342.)
2. It was proposed by the Austrian delegate at the Brussels Conference, that a distinction should be made between an armistice and a suspension of arms; but Sir Alfred Horsford, the British delegate, demanded that the proposed distinction should not be made, on the ground that in English there is no special term to express a suspension of arms, the terms used being an armistice of so many hours or days. General Voigts-Rhetz, first German delegate, stated, that when there is a suspension of arms, it is by agreement, for some special object, such as burying the dead. Each party retains its position; hostilities cease; to fire on your adversary is forbidden. The Austrian delegate pointed out, that when there is an armistice there is between the two hostile armies a neutral zone, which does not exist in a suspension of arms. (*Blue Book*, p. 209.)
3. The following form is given by the *Manual of Military Law* as a guide to be followed by British Commanders in concluding a suspension of arms.

FORM OF SUSPENSION OF ARMS FOR THE BURIAL OF THE DEAD.

"General A. B., commanding the British forces at ———, and General C. D., commanding the ——— forces at ———, agree as follows:—

"*Art.* 1. A suspension of arms for the space of three hours, beginning at ten o'clock and ending at one o'clock, on this —— day of ——— is agreed to for the purpose of burying the dead and withdrawing the wounded.

"*Art.* 2. The beginning of the suspension of arms shall be notified by two white flags hoisted simultaneously, the one within the British lines and the other within the —— lines. The white flags shall continue flying during the suspension of arms, and such flags shall be lowered simultaneously as a signal of the conclusion of the suspension of arms.

"*Art.* 3. The British troops shall not, during the suspension of arms, advance beyond the —— line, and the ——— troops shall not advance beyond the —— line. The space between the two lines shall be open to all persons engaged in burying the dead, or in attending to the wounded, or in carrying away the dead or the wounded, but to no other persons.

"*Art.* 4. All firing shall cease during the suspension of arms. The troops on both sides may take meals, and do all acts necessary for supplying themselves with food; but save as aforesaid, they shall remain in their existing positions, and shall not undertake any military operations or movements whatsoever."

CAPITULATION.

79 A capitulation is an agreement entered into by the commanding officer for the surrender of his army, or by the governor of a town or a fortress, or particular district of country, to surrender it into the hands of the enemy.

The commanders of troops are assumed to be invested with

powers of capitulation, which are necessarily implied in their office. If they surrender when they might have resisted further, or upon worse terms than they might have made, they are accountable to their own State for their misconduct, but the abuse of their power does not affect any compact which they make in exercising that power. In a surrender, the questions at issue are the immediate possession of the place, and the fate of the force or garrison; the capitulation, therefore, must be limited to these questions.

80 The terms of a capitulation may be, unconditional surrender, or surrender "with all the honours of war." The latter phrase is usually construed to include the right to march with colours displayed, drums beating, &c. It is proper, however, that such matters should be precisely stated in the articles of capitulation.

In capitulations for the surrender of strong places or fortified camps, the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war, unless exchanged. (*American Instructions*, *Art.* 129.)

Conditions for the protection of the inhabitants from pillage or from contributions are permissible. Care usually is taken to stipulate that towns or districts surrendered shall "retain all their liberties, privileges, and immunities;" the conqueror may, however, if they have borne arms against him, treat them as vanquished foes and prisoners of war.

A stipulation by a General that the troops are *never* again to bear arms against the same enemy, or that the sovereignty of a town should change hands, would be invalid, unless special authority to that effect had been given to him, or his acts should subsequently receive the sanction of his Government.

1. The Brussels Conference of 1874 declares :—

"*Art.* 46. The conditions of capitulations shall be discussed by the contracting parties. These conditions should not be contrary to military honour. When once settled by a Convention they should be scrupulously observed by both sides."

2. So soon as a capitulation is signed, the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition in his possession during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same. (*American Instructions, Art.* 144.)

3. Treating for the capitulation of an armed force in the open field by an officer of any rank was forbidden by French decree, issued May 1st, 1812; and any such capitulation, resulting in the laying down of arms, was to be considered dishonourable and criminal, and punished with death. Any other capitulation was to be considered the same if the commander had not done everything prescribed by duty and honour. (*General Ambert*, p. 284.)

INSTANCES OF CAPITULATIONS MADE.

4. American War, 1863-5. In April 1865, General Grant wrote to General Lee that he proposed to receive the surrender of the Army of Northern Virginia on the following terms :—

"(1) That rolls of all the officers and men were to be made in duplicate, one copy to be given to an officer of the selection of the former, the other to be retained by whomsoever the latter might appoint.

"(2) That the officers give their individual paroles not to take arms against the Government of the United States until properly exchanged, and each commander of a company or regiment to sign a like parole for his men. The arms, artillery, and public property to be parked and stacked, and turned over to the officers appointed by the former to receive them. That this do not include the side-arms of the officers, nor their private horses or baggage.

"(3) That this being done, each officer and man shall

be allowed to return to his home, and shall not be disturbed by the United States authority so long as they observe their paroles and the laws in force where they reside."

General Lee accepted these terms on the same day, and the other rebel armies subsequently surrendered on substantially the same terms. (*Halleck*, ii. 349.)

5. Capitulations are sometimes made without any previous negotiations, as, for instance, that of Phalsbourg on December 12th, 1870. After four months of resistance, having no more provisions, the Commandant of the place, with the concurrence of his Council of Defence, destroyed his artillery, his ammunition, his arms, and everything that the enemy could show as a trophy; then, the work of destruction being completely finished, he opened the gates and informed the besiegers that he surrendered at discretion. The Commission of Inquiry that investigated these circumstances pronounced that Commandant Taillant and his Council of Defence had derserved commendation.

6. The following were the terms of the capitulation of the French Army at Sedan :—

"*Art.* 1. The French Army, placed under the orders of General Wimpffen, finding itself actually surrounded by superior forces round Sedan, are prisoners of war.

"*Art.* Seeing the brave defence of this French Army, exemption is made in respect of all the generals and officers, and also of the superior *employés* having the rank of officers, who pledge their word of honour in writing not to bear arms against Germany, nor to act in any manner against its interests, until the close of the present war. The officers and *employés* who accept these conditions will retain their arms and personal effects.

"*Art.* 3. All arms, as well as the *matériel* of the army, consisting of flags, eagles, cannon, horses, ammunition, &c. shall be immediately delivered at Sedan to a military commission appointed by the General-in-chief, in order to be forthwith handed over to German commissaries.

"*Art.* 4. The town and fortified works of Sedan shall be given up in their present condition at latest on the evening of the 2nd of September, and be subject to the disposition of his Majesty, King William.

"*Art.* 5. Those officers who shall not have accepted the engagement set forth in *Art.* 2, together with the disarmed troops, shall be marched out, ranged according to their regiments or corps, in military order. This proceeding will commence on the 2nd September, and will terminate on September 3rd. These detachments will be marched to the districts bordering on the Meuse, near Iges, to be handed over to German commissaries by their officers, who will then resign their commands to their sub-officers. The chief surgeons, without exception, will remain behind to attend to the wounded.

"VON MOLTKE,
"WIMPFFEN."

"Frenois,
"*September 2nd*, 1870."

Besides the 25,000 soldiers taken in the battle, 84,450 became prisoners of war by this surrender, and 14,000 French wounded were found in and around Sedan. More than 500 guns, including 70 mitrailleuses, 330 field and and 150 fortress guns, 10,000 horses, 100,000 chassepôts, and large quantities of war *matériel* also fell into the hands of the victors. Among the prisoners were an Emperor and a Marshal of France, 39 generals, 230 staff, and 2095 other officers, nearly all of whom chose to accompany the soldiers into captivity rather than be liberated on parole. (*Franco-Prussian War*, i. 436.)

7. "The capitulation of Strasburg was framed on the 27th of September, 1870, on the model of that of Sedan.

The terms for the capitulation of Metz, by which that fortress, with 173,000 prisoners of war, was surrendered to the Germans, in addition to the leading points stipulated that the French troops should be conducted, without arms, by regiments or regimental corps, in military order, to some place to be afterwards indicated by the Prussians; that the French officers in command of the men should, after their arrival at this place, be at liberty to return to the entrenched camps, or to Metz, on giving their word of honour not to quit either place without an order of permission from the German Commandant; that the troops, after surrender, should be marched to bivouac, retaining their personal effects, cooking utensils, &c.; that

the French generals, officers, and military *employés* ranking as commissioned officers, who should engage by written promise not to bear arms against Germany, or to agitate against Prussian interests during the war, should not be made prisoners, but should be permitted to retain their arms, and to keep their personal property, in recognition of the courage displayed by them during the campaign. It was also agreed that all questions of detail, such as might concern the commercial rights of the town of Metz, and the interests and rights of civilians and non-combatants, should be considered and treated subsequently in an appendix to the military paper of capitulation; and that any clause, sentence, or word which might present a doubt as to its exact meaning should be interpreted in favour of the French people. (*Franco-Prussian War*, ii. 120.)

8. For the capitulation of Paris, on the 28th January, 1871, the terms were comparatively light, with the exception of a fine of £8,000,000 levied on the city. The city itself was not to be occupied, and even its name did not occur in the Articles of Capitulation, which professed to treat only of the surrender of the forts (subsequently 30,000 men occupied the Champs Elysée and Place de la Concorde). The troops in them were to be disarmed and confined in Paris; but the National Guard, and one division of the line, deputed to keep order in the city, were to receive old-fashioned breech-loaders (*tabatières*) and muzzle-loaders in exchange for chassepôts. No public property was to be removed, but all munitions of war were to come into possession of the captors. The general armistice included the re-victualling of the city, and the convocation of a freely-elected Assembly, which should authorize either the conditions of peace or the continuance of the war. (*Franco-Prussian War*, ii. 265.)

9. The capitulation of Verdun, on the 8th November, 1870, stipulated for giving up the place and its *matériel* to Germany, "on the express condition that it should be restored to France at the conclusion of the peace." This condition evidently exceeded the powers of the contracting parties, and laid no obligation on the respective Governments. The Council of Inquiry, assembled afterwards to

judge of its value, declared rightly "that it did not belong to the Commandant of a place to foresee the consequences of a war and the conditions of a treaty of peace, which can annul the clauses stipulated for in a capitulation."

10. The *Manual of Military Law* gives the following as the normal form to be used by British commanders when negotiating for the capitulation of an enemy :—

FORM OF CAPITULATION.

"A. B.———, Major-General, having full powers from C. D. ———, General, Commander-in-Chief of Her Britannic Majesty's Forces now in ———, to negotiate terms for the capitulation of the town and fortress of ———, and E. F. ———, General of Division, having full powers from his Excellency, G. H. ———, Military Governor of the said town and fortress of ———, in relation to negotiating terms for the said capitulation, have agreed to the following stipulations :—

"*Art.* 1. The town and fortress of ———, together with forts —— and —— and all other outlying fortifications, also the guns, warlike materials, and military stores of every description, subject only to the exceptions hereinafter mentioned, shall be surrendered in their existing state to the Forces of Her Britannic Majesty.

"*Art.* 2. The garrison shall march out from the ——— Gate, (at 10 a.m.) on the —— day of ——, with all the honours of war, including colours flying and drums beating, and shall lay down their arms on the glacis, and shall be transported as prisoners of war to such places as may be decided upon.

"*Art.* 3. The officers of the garrison shall retain their swords, accoutrements, and horses (and shall be released on parole). The troops of the garrison shall retain their knapsacks.

"*Art.* 4. The sick and wounded of the garrison shall be regarded as prisoners of war. Those who are in a fit state to be moved shall accompany the garrison. The remainder shall be committed to the protection of the officer commanding Her Britannic Majesty's Forces in

———, and shall be attended by ——— medical officers[1] until their condition admits of their removal as prisoners of war. So long as these remain in ————, any sick or wounded of the garrison, a competent staff of —— medical officers shall remain in charge of them.[1]

"*Art.* 5. All classes of the inhabitants of the town of ——— shall be permitted to remain in full enjoyment of their property, privileges, rights, and liberties, in the exercise of their lawful trades and callings, and shall not be in any way called to account for any acts or opinions prior to the date of the capitulation, and shall be at liberty to remain in ———, or to depart at any time, and so long as they remain shall be under the protection of the officer commanding her Britannic Majesty's troops in ——

"*Art.* 6. An inventory shall be drawn up of all the guns, warlike material, and military stores agreed to be surrendered; and commissioners shall be appointed on each side to superintend the transfer of all such guns, material, and stores, in accordance with *Art.* 1.

"*Art.* 7. Any difficulties that may arise respecting the interpretation of any of these articles shall be determined, as far as is possible, in favour of the garrison.

"*Art.* 8. This capitulation shall not come into force until it has been ratified by the signatures of the above-mentioned C. D. and G. H.; but immediately on the capitulation being so ratified, the ——— gate shall be occupied by a detachment of British troops.

Made at .....
the ..... day of 18
(Signed) .....

SURRENDER OF INDIVIDUALS OR SMALL DETACHMENTS.

81 Small detached parties or individuals, whether belonging to the military service or not, who happen to fall in with the enemy in a place distant from succour or any superior

[1] The medical officers in this *Art.* are medical officers sent by the Government to whom the wounded belong.

officer, are left to their own discretion, and may, so far as concerns their own persons, do everything which a commander might do with respect to himself and the troops under his command.

1. Promises made by individuals under such circumstances, if confined to their own persons and within the sphere of a private individual, are valid and binding, and their own State has no right to release them from their obligations, or compel them to violate the compact. For when a subject can neither receive his sovereign's commands, nor enjoy his protection, he resumes his natural rights, and may provide for his safety by any just and honourable means in his power.
2. If a soldier, however, be made prisoner in the vicinity of his commander, and while under his immediate orders, he is not properly the master of his own acts, or left to his own discretion, and should wait as a prisoner of war till his superiors can treat for his exchange or release. But if he falls into the hands of a barbarous enemy, and, to avoid a cruel imprisonment, or to save his life, he promises a ransom, or services not treasonable, his agreement should be respected by his superiors. (*Halleck*, ii. 349.)

FLAGS OF TRUCE.

82 The legitimate use of a flag of truce is to obtain protection for those bearing it from attack, in order to convey authorized communications to the enemy. The surreptitious use of a flag of truce, for the purpose of gaining information, exposes its bearer to treatment as a spy.

A bearer of a flag of truce, or *parlementaire*, cannot insist on admittance into the enemy's lines, and should not be allowed without permission to approach sufficiently near to acquire information.

When a flag of truce is sent, the troops from which it is

sent should halt and cease firing. The troops to which it is sent, if willing to receive it, will also cease firing.

Firing does not necessarily cease on appearance of a flag of truce, and no complaint can be made if the bearers of it are killed. When the flag is to be refused admittance, signal to that effect should be made, and if it is not obeyed the bearers can be fired on.

1. The Brussels Conference of 1874 declared:—

"*Art.* 43. An individual authorized by one of the belligerents to confer with the other, on presenting himself with a white flag, accompanied by a trumpeter (bugler or drummer), or also by a flag-bearer, shall be recognized as the bearer of a flag of truce. He, as well as the trumpeter, &c., and the flag-bearer who accompany him, shall have the right of inviolability.

2. "*Art.* 44. The commander to whom a bearer of a flag of truce is despatched is not obliged to receive him under all circumstances and conditions. It is lawful for him to take all measures necessary for preventing the bearer of the flag of truce taking advantage of his stay within the radius of the enemy's position to the prejudice of the latter; and if the bearer of the flag of truce is found guilty of such a breach of confidence, he has right to detain him temporarily. He may equally declare beforehand that he will not receive bearers of flags of truce during a certain period. Envoys presenting themselves after such a notification from the side to which it has been given, forfeit their right to inviolability."

3. During the discussion on this subject at the Brussels Conference, the general opinion elicited was that an adversary who has not given notice is bound to receive a flag of truce.

The Swedish delegate, Colonel Staaf, observed, that not to receive a flag of truce was a serious matter, it being the last resource of armies at bay and of populations in distress; and considered that the period during which an enemy should be allowed to use his power should be limited. General von Voigts-Rhetz, the first German delegate,

observed, that he did not personally know of cases of this nature, but that it has been decided by the greatest commanders that they would not, during critical circumstances, especially during the retreat of an army, receive bearers of flags of truce.

The Austro-Hungarian delegate, General de Schönfield, supported the power to refuse to receive, on the ground that it might be the enemy's interest to send several bearers of flags of truce in order to gain time, which is very important. (*Blue-Book*, p. 208.)

4. The *American Instructions* of 1863 state:—

"*Art.* 111. The bearer of a flag of truce cannot insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

"*Art.* 112. If the bearer of a flag of truce offers himself during an engagement, he can be admitted as a very rare exception only. It is no breach of faith to retain such a flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

"*Art.* 113. If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever."

5. Lord Wolseley (*Soldier's Pocket Book*, p. 201) says of the reception of a flag of truce, "An officer remains with the bearers until an answer as to their admittance is received from head quarters. He should not allow them to proceed more than a few yards inside the line of sentries; nor must he allow them to talk to others. He must be careful that advantage is not taken of the situation for the examination of of our position. He will therefore detain them in such a place that they can only see well in the direction of their own camp. The usual custom is to conduct an officer, bearing a flag of truce, to some house or tent in or near camp, blindfolded."

6. The *French Regulations* (*Manual*, p. 56, *n.*) state:—

"As a rule, a commandant should have as little communication with the enemy as possible, and allow none whatever on the part of his men. Frequency of such communications almost always is a sign of feebleness in

the commander; the confidence and *morale* of the troops cannot fail to be injured by it."

7. The Duke of Wellington, in a general order dated January 20th, 1814, directs:—"No communication with the enemy whatever may originate with the allied army which is not ordered from head-quarters; all communication from the enemy must be sent to head-quarters, as the commander of the forces alone can give an answer."

ABUSE OF FLAGS OF TRUCE.

83 The abuse of a flag of truce by surreptitiously obtaining military knowledge under its protection is an especially heinous offence, and the bearer of the flag thus abusing his sacred character is deemed a spy. The Brussels Conference of 1874 laid down that, "The bearer of a flag of truce forfeits his right of inviolability if it be proved in a positive and irrefutable manner that he has taken advantage of his privileged position to incite to or commit an act of treachery." (*Art.* 45.)

So sacred is the character of a flag of truce, and so necessary is its sacredness, that great caution is necessary in convicting the bearer of such a flag as a spy.

1. The *French Manual* of 1884 says (p. 57):—

"A *parlementaire* loses his right of inviolability if he abuses his privileged position to provoke or commit an act of perfidy. If such a case occurs, it exposes him to be treated as a spy or a traitor; but any rigorous measures taken, and the motives for them, should always be brought as soon as possible to the knowledge of the enemy.

SAFE-CONDUCT.

84 "Safe-conduct," is the name usually given to the document which authorizes an enemy or an alien, in time of war, to go into places where he could not go without danger, or to carry on trade forbidden by the Laws of War.

A safe-conduct applies to both persons and things, and may admit of the removal of the things specified by some person other than the owner.

Safe-conducts must be interpreted strictly, must be confined to the persons, effects, purpose, place, and time for which they are granted, and may, for good reasons, be revoked by the authority which granted it. A safe-conduct granted by an officer may, for good reasons, be revoked by his superior, but until so revoked, is as binding upon the successor as on the party who issued it.

1. The *American Instructions* lay down, that "intercourse between the territories occupied by belligerent armies, whether by safe-conduct, permission to trade on a small or large scale, by exchanging mails, or by travel from one territory into the other, can take place only according to agreements approved by the government, or by the highest military authority. Contraventions of this being highly punishable." (*Art.* 86.)
2. "Ambassadors, and all other diplomatic agents of neutral powers, accredited to the enemy, may receive safe-conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It implies no international affront if the safe-conduct is declined. Such passes are usually given by the supreme authority of the State and not by subordinate officers." (*Art.* 87.)

PASSPORTS.

85 The term "passport" is applied to personal permissions given on ordinary occasions, both in peace and war, where there is no reason why the parties named in them should not go where they please.

A passport is not transferable by the person named in the permission; for although there were no objections to giving

the privilege to him, there might be very serious objections to the individual who took his place. It generally includes, however, the servants and personal baggage of the person to whom it is granted, unless there should be particular objections to this. To save all doubt and difficulty in such matters, it is usual to give, in the passport itself, a personal description of the party to whom it is given, and to state precisely every particular with respect to the extent of the indulgence granted by it.

1. The use of a passport is confined strictly to the person, purpose, place, and time for which it was granted. If the person who has received a passport should be detained in an enemy's country by sickness or by force beyond the specified time, he is entitled to receive a new one, or to be considered as still under the protection of the old one. No detention by business, or by circumstances not entirely unavoidable, will, however, entitle him to such an indulgence; if, for example, he should take advantage of a suspension of hostilities to remain, he will do so at his peril, and if he should be found in an enemy's country at the termination of the truce and the time named in his passport has expired, he will be subject to the ordinary Laws of War, without any claim for special protection.
2. A passport may be revoked by the authority which granted it for sufficient reason, and a passport granted by an officer may, on the same ground, be revoked by a superior officer; but the granting and revocation of a passport must never be used as a means for getting persons into our power, as such conduct would be perfidious and contrary to the Laws of War. (*Halleck*, ii. 352.)
3. By an Act of Congress of 1790, any person violating any safe-conduct or passport, duly obtained and issued under the authority of the United States, is liable, on conviction, to imprisonment not exceeding three years, or to a fine, at the discretion of the Court.

SAFEGUARDS.

86 Safeguards are guards posted by commanding officers of belligerent forces for the protection of property or persons from their own troops. Sometimes they are delivered to the parties whose persons or property are to be protected; at others they are posted upon the property itself, as upon a church, museum, library, public office, or private dwelling.

They are particularly useful in the assault of a place, or immediately after its capture, or after the termination of a battle, to protect the persons and property of friends from destruction by an excited soldiery.

1. Violations of safeguard are usually punished with the utmost severity. A guard of men is sometimes posted to enforce compliance with the safeguard; such guards are justified in resorting to the severest measures to punish any violation of the safety of their trust.
2. By British Military Law (*A. A.*, 6. *c*), any person subject to Military Law who "forces a safeguard," is liable, on conviction, if such offence is committed on active service, to suffer death; under other circumstances, to cashiering or imprisonment according to rank. Similar punishment is awarded to this offence in the *American Articles of War.*

CHAPTER VI.

USAGE OF WAR TOWARDS UNCIVILIZED RACES.

87 When a civilized nation is at war with barbarians, or uncivilized races, who do not acknowledge the obligations of International Law, it frequently becomes impossible to carry out the milder usages of modern warfare.

In accordance with the rule of reciprocity, on which the Laws of War are in great measure based, the civilized belligerent may carry out the stern rights of war in their extreme measure to meet the conduct of his adversary, and may retaliate to a certain extent; but it will never be justifiable for a civilized belligerent to adopt barbarous and cruel measures condemned by International Law.

1. General Halleck says (ii. 95): "Suppose an enemy should massacre all prisoners of war, this would not afford a sufficient justification for the opposing belligerent to do the same. Suppose an enemy should use poisoned weapons, or poison springs and food, the rule of reciprocity would not justify us in resorting to the same means of retaliation. A savage enemy might kill alike old men, women, and children, but no civilized power would resort to similar measures of cruelty and barbarism, under the plea that they were justified by the law of retaliation."
2. At the same time, the Laws of War permit the refusal of quarter where the enemy either refuses it, or kills those

who fall into his hands as prisoners or wounded; it also allows of the destruction of the enemy's towns and villages as a retaliating measure.

3. The *American Instructions* of 1863 state (*Art.* 62):—"All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none."

The burning of towns and villages as a means of retaliation was carried out even in the Franco-German War by the Germans, and to a considerable extent.

88 Countries frequently engaged in war with uncivilized races, such as Great Britain and Russia, incur considerable danger from the effect of such warfare on their officers and soldiers in two ways.

One is, that the officers, accustomed to the tactics successful against barbarians, may attempt the same tactics against a civilized foe with disastrous results; or that, accustomed to easy victory over largely superior numbers, they may be unprepared to overcome the determined resistance of disciplined troops. It is supposed that these causes had something to do with the disasters of the French army in 1870-1, owing to the influence of their campaigns against the Arabs in Algeria.

The converse of this also holds good, and troops trained to meet a disciplined foe, may use the tactics appropriate for this purpose against a barbarous enemy with disastrous effect to themselves. The massacre of British troops at Isandhlana, and the failure of the Russians before Geok Tepe in 1879, may be considered as instances of this.

The other evil influence to which troops who are frequently engaged with barbarians are subject, is one connected with the Laws of War—namely, that they may be tempted to adopt a cruel and barbarous method of warfare. When fighting a foe who gives no quarter, who kills and even mutilates the wounded, it is impossible but that a revengeful spirit should

arise among the troops, and that soldiers should be tempted to extreme measures. The consequence of giving way to this will be, that these troops not only take a step backwards in civilization, but that they will become more difficult to restrain from excesses when fighting a civilized enemy. Troops allowed to indulge in excesses against a barbarous foe will also infallibly suffer in their discipline, and consequently become less dangerous to a disciplined enemy. This connection between restraint from excess and efficiency in action must strike every reader of the Duke of Wellington's Despatches from the Peninsula.

1. It is well worthy of notice and reflection, that the European battle-fields became distinctly more barbarous after habits of greater ferocity had been acquired in wars beyond the Atlantic, in which the customary restraints were forgotten, and the ties of a common human nature dissolved by the differences of religion and race.

   The same effect resulted in Roman history, when the extended dominion of the Republic brought its armies into contact with foes beyond the sea. The Roman annalists bear witness to the deterioration that ensued both in their modes of waging war and in the national character. It is in an Asiatic war that we first hear of a Roman General poisoning the springs; in a war for the possession of Crete that the Cretan captives preferred to poison themselves rather than suffer the cruelties inflicted on them by Metellus; in the Thracian war that the Romans cut off their prisoners' hands, as Cæsar afterwards did those of the Gauls. And we should remember, that a practical English statesman like Cobden, foresaw, as a possible evil result of the closer relations between England and the East, a similar deterioration in the national character of his countrymen. "With another war or two," he wrote, "in India and China, the English people will have an appetite for bull-fights if not for gladiators." (*Farrer*, p. 168.)

   Those who have studied the late campaigns of the British and Russians against uncivilized races will not consider the dangers above depicted to be by any means purely imaginary.

89 Military necessity in the field requires that war should not be fought with gloves on, and the cruelty and outrages committed by an uncivilized enemy may dictate strong measures of reprisal; but in the interests of the troops themselves, as well as that of humanity and of civilization, a line should be distinctly drawn which should be passed on no pretext whatever.

This line should be defined in clear instructions drawn up beforehand by those in high authority, and commanders in the field should be ordered to adhere rigorously to them, and punish severely any infraction thereof. By this means measures often taken thoughtlessly, and under great provocation, but which all true lovers of their country must regret, would be restrained, and we should no longer hear of the cutting down of fruit trees, the destruction of water-wheels, breaking down of dams, and other such measures, which breed hatred among the population, and throw back the progress of a country for years.

1. Since writing the above, the following remarks have been noted, bearing on the point above discussed.

"There is no law, human or military, to justify barbarous acts even against barbarians. It may be necessary to take the wood of water-wheels for fuel for boilers, or for military or marine exigencies, but the destruction of sakkias (an apparatus for raising water) and irrigation machinery on any other ground is quite unjustifiable. The cutting down of date and doum palm trees, which are, along the valley of the Nile, as the air men breathe, is culpable to the last degree, and the ruin of growing crops not more excusable than the poisoning of wells, which the most ferocious enemy would condemn.

"The Germans marched through France when the fields were heavy with the harvest, and in the midst of the vintage season; but they knew well that the obloquy of civilized nations would attend them if, in order to hurt the

enemy and deprive him of the crops and wine harvest, they laid the country waste; though they did not hesitate to starve Paris and Metz; and if these Arabs of the Soudan are ever to be reconciled to us, there must be some measure of mercy enforced on the troops in their operations." (*Army and Navy Gazette*, May 9th, 1885.)

2. Vattel says, "That those who tear up vines and cut down fruit trees are to be looked upon as savage. The Fijian islanders were barbarians enough, but even they used to spare their enemies' fruit trees; so did the ancient Indians; and the Koran forbids the wanton destruction of fruit trees, palm trees, corn, and cattle." (*Farrer*, p. 16.)

90 There is no doubt considerable truth in the contention, that the difference between civilized and uncivilized warfare is to a large extent superficial. Mr. Farrer, in arguing on this point, says, that the more polished people "invent the expression 'civilized warfare' to emphasize a distinction they, would fain think inherent in the nature of things; and look, by its help, even on the mode of killing an enemy, with a moral vision that is absurdly distorted. How few of us, for example, but see the utmost barbarity in sticking a man with an assegai, yet none whatever in doing so with a bayonet! And why should we pride ourselves on not mutilating the dead, while we have no scruples as to the extent to which we mutilate the living."

When the nations of Christendom came in contact with unknown and savage races, they assumed that because their customs were different from their own, they had therefore no Laws of War, and that therefore no law need to be observed when conducting hostilities with them.

1. Mr. Farrer points out that this is an error, and that most uncivilized races have rules of warfare, and quotes many interesting instances of the existence of such rules among them. (*Farrer*, pp. 159—163.)

The same writer gives many instances also of the use of extreme measures towards barbarous enemies, and says:—"Whatever value there may be in our own Laws of War, as helping to constitute a real difference between savage and civilized warfare; the best way to spread the blessing of a knowledge of them would clearly be, for the more civilized races to adhere to them strictly, in all wars waged with their less advanced neighbours." He then goes on to state, that an English Commander is no more justified in setting fire to barbarous capitals than to Paris or Berlin, and similar arguments; but he fails to see that the circumstances are entirely different. When the whole population of a savage foe retreats before a civilized army, into inaccessible wilds where it would be madness to follow, the only way of dealing him a blow is to destroy what property he has left within reach. If a civilized enemy behaved similarly, similar treatment would have to follow.

DUTY TOWARDS UNCIVILIZED ALLIES.

91 If it is the duty of a civilized State to carry out, towards a savage foe, the usages of civilized warfare to the greatest extent possible, stronger still is its duty to treat barbarian allies in the same manner.

To practise towards uncivilized allies conduct justly held to be disgraceful when practised towards those of more cultured races, and which only their weakness and ignorance prevent them from resenting themselves, or inducing others to resent, can only be described rightly as unjust and dishonourable to the last degree.

When a great European power invades an uncivilized country for its own ends, by bribes and promises induces tribes inhabiting that country to join or assist its forces, and then, when its work is done, leaves these unhappy wretches to the vengeance of their enraged countrymen; such action is none other than the extreme of baseness, and must be regarded by all honourable persons with contempt.

CHAPTER VII.

THE LAWS OF WAR APPLIED TO CIVIL WAR OR REBELLION.

92 The *American Instructions* of 1863, drawn up during the Great Civil War between North and South, and followed by the Commander of the United States armies during the war, lay down the following principles respecting the application of the Laws of War to civil strife.

DEFINITIONS.

1. "*Art.* 150. *Civil War* is war between two or more portions of a country or State, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the State are contiguous to those containing the seat of government.
2. "*Art.* 151. The term *rebellion* is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions or provinces of the same, who seek to throw off their allegiance to it, and set up a government of their own. The adoption of the rules of regular war does not imply acknowledgment of the rebel government.
3. "*Art.* 152. When humanity induces the adoption of the rules of regular war towards rebels, whether the adoption

is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them as an independent or sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government towards rebels, the ground of their own acknowledgment of the revolted people as an independent power.

4. "*Art.* 153. Treating captured rebels as prisoners of war, exchanging them, concluding cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming law in their territory, or levying war-taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war towards rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the future relations between the contending parties. The adoption of the Laws of War does not absolve rebels from punishment.

5. "*Art.* 154. Treating in the field the rebellious enemy according to the Laws and Usages of War has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty."

DISTINCTION MADE BETWEEN THE LOYAL AND DISLOYAL CITIZENS.

6. "*Art.* 155. The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country, and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the

rebellion, without positively aiding it; and those who, without taking up arms, give positive aid and comfort to the rebellious enemy, without being bodily forced thereto.

"*Art.* 156. Common justice and plain expediency require that the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war, as much as the common misfortune of all war admits. The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens of the revolted portion or province, subjecting them to a stricter police than the non-combatant enemies have to suffer in regular war; and if he deems it appropriate, or if his Government demands of him that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate Government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal to the Government.

"Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his Government have the right to decide."

CHAPTER VIII.

THE BRUSSELS CONFERENCE OF 1874.

93 THE reasons for calling together the Brussels Conference were thus expressed in the instructions given to the Russian delegates. (*See also* § 4.)

1. "The object which the Emperor has in view in promoting the Brussels meeting is especially that of humanity. On this ground, however, it is necessary to steer clear of Utopian ideas. It is to be hoped that the progress of enlightenment and morality will render war less frequent. In the present state of things, however, war continues to exist as an evil, which, if not necessary, is at any rate one which it is at times impossible to avoid.

"No Government would certainly in these days lightly undertake a war. But it should be foreseen, that in proportion as the grounds on which wars are undertaken become serious, and in proportion as modern armies become national in their composition, so will war assume a more grave aspect. The freedom of action of Government from a military point of view, and the right of States to provide for their own defence, cannot, therefore, be made subject to fictitious restrictions, which the pressure of circumstances would, moreover, render futile. It appears to us that no illusion can prevail in practice against this inexorable necessity.

"War, however, cannot be the normal state of nations.

It is but a painful exception. The rule consists of peaceful relations, which, in consolidating the interests of nations, soften the manners of mankind. The duty of Governments is, therefore, while holding themselves in readiness for war, to employ all their efforts to maintain peace so long as it exists, to re-establish it if it be disturbed. From this point of view, the sole legitimate object of every war is to obtain as promptly as possible a more solid and a more lasting peace. It will be impossible to gain this object unless the war be carried out with energy and according to rule, in conformity with the laws and customs which time and usage have rendered sacred among civilized nations, and unless security be provided against the occurrences of the useless calamities and gratuitous cruelties which, while inflaming passions, cause reprisals and generate resentments which render the restoration of peaceful relations more difficult.

"It is not, therefore, the sentiment of humanity alone, but a well-understood general interest which should induce Governments not to lose sight of peace during war, just as they hold themselves prepared for war during peace."

* * * * * *

"If it were possible to state precisely in a practical measure, by general agreement, what, on the one hand, the necessities of war permit; and what, on the other hand, the general interest of humanity forbids, in the present state of civilization and of international relations; Governments and armies, knowing precisely what a state of war authorizes and what it does not sanction, and nations being thus in a position to estimate beforehand the consequence of war and to foresee its effects, it is unquestionable that an important step would be gained towards regulating that evil and diminishing its calamities, which are too often caused by the uncertainty and ignorance which still exist on this subject."

* * * * * *

"The hope of diminishing, if only to a limited degree, the responsibility which war throws upon Governments as well as the calamities which it imposes on populations, constitutes a task worthy of the sovereigns and of the

Governments which have answered with so much promptness the appeal of the Emperor."

2. When the Conference was assembled, the British Government, as represented by Lord Derby, then Foreign Secretary, notified to the Russian Government, who proposed the Conference, and to the Conference itself; that "they are firmly determined not to enter into any discussion of the rules of International Law by which the relations of belligerents are guided, or to undertake any new obligations or engagements of any kind in regard to general principles." They further required a positive assurance that the subject of maritime operations or naval warfare should not be discussed.

General Sir Alfred Horsford, who, with Colonel Hale and Mr. March as secretaries, composed the British delegation; was also instructed to "abstain from taking part in any discussion upon any points which may be brought forward which may appear to you to extend to general principles of International Law not already universally recognized and accepted."

3. The proceedings of the Conference are given in the *Parliamentary Blue Book* on the subject; the results arrived at have been largely quoted in the preceding pages. The result of the Conference was thus described in the final report of the Committee which drew up the protocols to the full Conference—the said Committee being composed of one member for each country taking part in the Conference:—

"The articles of the project discussed, which relate to the means of making war, sieges and bombardments, spies, prisoners of war, the sick and wounded, armistices and capitulations, flags of truce, the inviolability of persons and of private property, of religious, scientific, or artistic establishments, have been the object of texts drawn up in a spirit of compromise, destined to reconcile all shades of opinion. With regard to the more delicate questions, they have been discussed, the various views brought to light, and although no resolutions were passed concerning them, the opinions given are recorded in the protocols. The work of the Conference bears the character of an inquiry which will be of use to the respective Governments, and

will serve to define the humane principles which exist in public opinion, within a limit at the same time possible and practical, and also to define the rights of force, in order that they may be confined to certain limits."

It was stated that the result must not be looked on as the final word of civilization, but as the first attempt to give the Laws of War a truly international character, and as expressing the amount of concession which public opinion is at present strong enough to take from the rights of war in the interests of humanity.

4. As will have been seen, the position taken up by the British Government with reference to the Conference was one of great reserve, if not of suspicion; and in consequence of the instructions given him, the part taken by the British delegate was mainly one of observation only.

5. At the close of the Conference Lord Derby sent a letter, dated January 20th, 1875, to Her Majesty's representatives in all the countries from which delegates had been sent, this letter being a copy of one to Lord A. Loftus, British ambassador at St. Petersburg, in answer to a request from the Russian Government to be informed of the conclusions arrived at by the various Governments as to the result of the Conference. In this letter Lord Derby states, that while Her Majesty's Government highly appreciates the humane motives by which the Emperor of Russia was actuated in proposing the Conference, and concurs in his earnest desire to mitigate the severities of war, "Her Majesty's Government are not convinced of the practical necessity for such a scheme for the guidance of military commanders in the field," and feared the examination of the project might "re-open causes of difference, and lead to recriminations between some of the delegates."

6. A summary of the proceedings is then given, bringing out in special relief the points on which difference of opinion had occurred. In the course of this summary it is stated, that "Instead of mere rules for the guidance of military commanders based upon usage, upon which a general understanding could be shown to be desirable in the interests of humanity, the articles of the project were seen to contain, or to imply, numerous innovations, for which no

practical necessity was proved to exist; and the result of which, if adopted, would have been greatly to the advantage of the Powers having large armies constantly prepared for war, and systems of universal compulsory service."

7. Of the articles adopted by the Conference, after discussion, on the subject of military occupations, it is observed:

"The discussion terminated in the adoption of modified articles, in which an effort was made to reconcile the conflicting views by the use of carefully balanced expressions. Her Majesty's Government fear that the inhabitants of the invaded territory would find in such colourless phrases very inadequate protection from the liberal interpretation of the necessities and possibilities of warfare by a victorious enemy; while the existence of rules, the meaning of which is not distinct and indisputable, could not fail, should they ever be actually promulgated, to give rise to angry controversies which would intensify rather than mitigate the horrors of war."

8. Of Reprisals the letter says:—"Her Majesty's Government understands that this was the only subject brought before the Conference which appeared likely to give rise to warmth of feeling from its relations with recent events." And with regard to the failure to agree, "Her Majesty's Government cannot conceal from themselves that, in passing over these articles in silence, the delegates really evaded one of the principal difficulties inherent in any scheme for the preparation of the Rules of War to be observed by belligerents, namely, the question how those rules are to be enforced."

9. The articles on which the Conference came to an agreement are remarked on slightingly: of those on prisoners of war it is said, "The articles themselves may possibly serve some useful purpose in recording the view taken by the delegates at Brussels of some details of the usual treatment of prisoners of war. It was not, however, proved that any real necessity existed for regulating these details. Her Majesty's Government regard the result of the Brussels Conference to have been to demonstrate that there is no possibility of an agreement upon the really important articles of the Russian project."

10. "Her Majesty's Government cannot consent to pursue the matter. A careful consideration of the whole matter has convinced them that it is their duty firmly to repudiate, on behalf of Great Britain and her allies in any future war, any project for altering the principles of International Law upon which this country has hitherto acted, and above all to refuse to be a party to any agreement, the effect of which would be to facilitate aggressive wars, and to paralyze the patriotic resistance of an invaded people." (*Correspondence on Brussels Conference*, No. 2, 1875.)

And so the letter ended.

11. Shortly afterwards an answer was returned from Russia, in which Prince Gortchacoff, on the part of the Emperor, expresses gratification at the appreciation of his motives by the British Government, but regrets that Great Britain took no part in the deliberations. "It would have been desirable that the voice of a great nation like England should have been heard in an inquiry, of which the object would appear to have met with its sympathies." In some accompanying observations Lord Derby's criticisms and depreciatory remarks are treated seriatim. It is stated that "The project of the Russian Government had no other object than that of dealing with the Laws and Customs of War which now exist, to seek by general consent that which was capable of being stated precisely, defined, rendered complete; and to acquire, by means of an exchange of declarations between the cabinets, a sanction which would be binding."

12. While confessing that great difficulties surrounded the definition of the rights of military occupation, it is remarked: "The English despatch does not solve them any the more by declaring that the interests of the invader and of the invaded are absolutely irreconcilable. This dogma would be the absolute proclamation of the unlimited rights of force." Again, it is said:—"It is precisely because the Law of Nations is wanting in precision and clearness that the Brussels project endeavours to supply, as far as possible, the place of these uncertainties, these blanks, and these contradictions."

13. Of the arguments put forth in support of the supposed

interests of the weaker States, it is said :—"In assuming in its own case unlimited rights, the weaker State would authorize the stronger to accept no other limits to its rights than those required by its own convenience or its own security. Barbarous warfare would ensue, and it is difficult to see what the weaker States especially would have to gain from this. The Russian project in no way contemplates developing the military power of great States, and procuring advantages in favour of those possessing large armies and where military service is obligatory. These powers exist. The advantages which they derive from their military organization likewise exist. The Conference did not create them."

14. Of the result of the Conference it is said :—"Should even the Conference have no other result for the present, its proceedings will remain as a solemn inquiry, declaring the light in which the Laws of War, its necessities and its consequences, are at present viewed by all civilized States. The protocols will, in the event of war, be consulted as evidence of a great moral value." Finally, the observations close with the following remark as to the line taken by Great Britain :—"If, nevertheless, the English Government states, in conclusion, that it will keep to the principles of International Law, in accordance with which its acts have been hitherto regulated, and that it will impose the same obligation upon its allies, it would have been desirable that its meaning should have been rendered complete by stating what those principles are; how it and its allies interpret the doubtful points, and fill up the blanks of International Law, especially with reference to the questions which have been the objects of discussion at Brussels; how they understand, according to International Law, the reciprocal rights and duties of the invader and invaded; of the occupier and the country occupied; of attack and of national defence; and the relations of the military power of the enemy in respect to private individuals and private property. What are, in short, those acts of war in the past, from which it may be gathered what will be their practice in the future. The vagueness with which the Law of Nations allows all these questions to be surrounded,

and which the English Government refuses to assist in clearing up, even by a simple common deliberation, has not hindered, and will not probably diminish, aggressive wars ; it appears doubtful whether it will protect from the rigour and abuse of force more efficaciously than in times past those people who have patriotically defended their native territory."

15. This correspondence, which can hardly be pleasant reading for Englishmen, is not a fit subject for criticism in these pages. The line taken by the British Government, and the tone in which the correspondence was conducted, may, however, be commended to the attention of our public men, and may, perhaps, be found to throw a light on our recent international relations.

16. The attitude of our own Government in this matter contrasts strongly with the action of President Lincoln when the great Civil War between North and South was being waged. Far from thinking it to be an advantage to leave the laws and usages of warfare enveloped in mystery and undefined, he took steps to have clear instructions issued, which were a guide to the officers of the United States armies throughout the war, and are still the principal practical authority on the subject.

CHAPTER IX.

THE FRENCH INVASION OF RUSSIA IN 1812.

94 The history of the French invasion of and retreat from Russia in 1812 exemplifies the frightful retaliation which may follow, when an advancing army injures and insults the population of the country it invades.

1. General Sir Robert Wilson, who accompanied the Russian army as British Commissioner throughout the campaign, in his *French Invasion of Russia*, thus writes of the want of discipline which prevailed:—"Of this mighty mass of 650,000 men which Napoleon destined for the invasion and conquest of Russia, 400,000 effective soldiers, of whom 160,000 were native French, and 60,000 cavalry, entered simultaneously into active operations against Russia; but the want of nationality soon began to occasion the most serious evils, for the heterogeneous multitude were actuated by no regard for the honour of the country under whose banner-in-chief they were ranked by the inhabitants, without any distinction of uniform or of language. Authority was weakened by the commingled service of troops regulated by no common system; discipline became relaxed; insubordination produced all its disorganizing consequences; confusion and want prevailed; pillage destroyed the resources, for there were no magazines provided, and exasperated the peasantry, who were further infuriated by wanton and outrageous desecration of their churches and sanctuaries."
2. Of the consequence of this desecration of religious buildings Sir Robert Wilson writes:—"The Russian is a religious votary, but not an intolerant bigot. He insults

no one for worshipping the God of all according to the practice of his forefathers, or the fashion of his own opinion. He lives on terms of perfect good-fellowship with the dissentient from his creed; he arrogates to himself no immunities or advantages founded upon his own profession of faith; but the famished tiger raging for food, is not more fierce and bloody in his wrath, than a Russian at the sight of his polluted temples and violated altars."

3. The invasion of Russia was commenced by the crossing of the Niemen on the 24th June, and by the 29th, constant rain, and mortality among the horses from eating green food only, had so disorganized the columns, that it was estimated that there were 30,000 stragglers on the line of operations, who committed deplorable excesses on the peasantry. As Sir Robert Wilson writes:—"The march through Prussia, a friendly country, had been a disastrous infliction on the population, from the want of due administrative arrangements; but devastation now became atrociously savage, and terror general." The same devastating spirit, the result in great measure of the lax discipline above described, continued throughout the French advance. Sir Robert Wilson, writing of the arrival of Napoleon at Gjatsk on the 1st September, says:—"The march of the enemy from Smolensk had been accompanied with the most barbarous destruction and disorder of every kind. Even the towns which they were occupying were set on fire with recklessly mad ferocity and disregard of their own interests. . . . . Nothing was respected; a demon spirit raged and revelled with exterminating fury, preparing a day of vengeance no less savage and calamitous." One result of this conduct, was the desertion of all the towns and villages by every inhabitant, before the arrival of the French, which greatly inconvenienced and exasperated the soldiers of Napoleon's army, who were reduced to frightful destitution and distress, and as early as the middle of September were existing to a great extent on horseflesh. Sir Robert Wilson writes:—"All the towns, villages, and hamlets were abandoned as the columns appeared. The old and infirm, the women and children, were placed with the movable effects on their telagas or carts," and accompanied the Russian army in its

retreat, not moving on the high roads, which was reserved for the army, but across the fields.

4. Moscow was deserted before the arrival of the French advanced troops; 180,000 souls out of 200,000, with 65,000 carriages, passed the barriers in funeral silence; only some thousand wounded and sick, incapable of removal, were left behind; and a few desperate men, who, in the fury of their hopeless resistance, showed the savage spirit of revenge which possessed the Russian nature. One of these desperadoes attacked a Colonel of Engineers on Murat's staff, dragged him off his horse, stabbed him in the back when falling, threw himself upon him to suffocate him, fixed his teeth in his neck, and retained his hold until his brains were beaten out by the French soldiers with repeated blows. On the evening of the day of his entering Moscow, September 14th, Murat bivouacked his troops outside the city to prevent pillage, but numbers of soldiers entered it after dark, and disorder and riot of every kind was indulged in. That night Moscow was in flames; the fire broke out in scores of places simultaneously, and continued until the city was destroyed. Of nearly 50,000 houses, only 2500 escaped destruction; out of 1600 churches, 800 were consumed and 500 damaged; while of 24,000 sick and wounded, more than 20,000 were burned alive. Between 200 and 300 Russians suspected as incendiaries were executed by the French; but this did not check the breaking out of fires until Moscow was consumed.

5. The destruction of the vast stores of supplies contained in Moscow, and on which he had so much relied, was a dreadful blow to Napoleon, whose army was soon reduced to the greatest straits for food and forage. The horses died by hundreds, impairing the efficiency of the cavalry and artillery, and thus giving opportunities to the Cossack horsemen, who captured great quantities of baggage. "One regiment of Cossacks made such booty of horses, watches, melted silver, and *louis d'or*, that each individual of it received as his own share £84 sterling."

6. Napoleon lingered at Moscow, affairs daily growing worse, until, on the 23rd October, his force retired from the city, in number 140,000 individuals, including 20,000 sick,

wounded, and non-combatants. On the 26th October he found himself compelled, by the position of the Russian forces, to retreat on Smolensk, the same route he had followed in his advance, a march of 260 miles through a devastated country, whose towns, sacked and burnt, offered neither supplies nor shelter from the weather, which on that night first turned ominously cold. At Mojaisk 1500 sick and wounded had to be abandoned to their fate for want of transport. The retreat continued, varied with constant fighting, and amid ever-increasing hardships from cold and hunger. On the 5th November snow fell; on the 6th, Berthier, writing to Victor, says,—"The cavalry of the army is already unhorsed; the cold has killed all the horses." The baggage of the army had to be abandoned, and was pillaged by the troops, all discipline having vanished; no orders were obeyed or property respected. Sir Robert Wilson writes:—"On the 6th rose that razor-cutting wind which hardened the snow and made it sparkle as it fell like small diamonds, whilst the air, under the effect of its contracting action, was filled with a continual ringing sound." The retreating army, already afflicted by hunger, fatigue, sickness, and wounds, were ill-prepared for this fresh trial, and "from this time a state of feeling prevailed that de-naturalized humanity—a general recklessness pervaded all—a callousness to every consideration but selfish momentary relief." The intense reverence and affection of the French soldiers for the great chief who had led them so often to victory shone forth amid their awful surroundings; when captive, no temptations, threats, or privations could induce them to reproach their Emperor; the famished, dying of hunger, refused food rather than utter a word against Napoleon. With this exception, rage appeared to madden all. Everything that could be fired was set in flames, and ruthless violence was used as well against helpless comrades as against foes. The maniacs tore away the clothing of their own companions when abandoned; and if any food was found, they turned their arms against each other. They repulsed with force every one who endeavoured to share their bivouac fire when one could be lighted, and mercilessly killed every prisoner.

7. And now, in their awful extremity, the wretched soldiers of Napoleon, maddened with their sufferings, had to reap the harvest of revenge they had sown by outraging and ill-treating the population of the country. The Russian peasants—their homes destroyed, their churches desecrated, their lands waste and ruined, their beloved Moscow in ashes—turned with savage ferocity on those at whose hands they had thus suffered. The first excesses of the troops of Napoleon had been met with retaliation by the Russians; excess was repaid by excess, outrage by outrage, until every trace of civilization vanished from the conduct of the combatants, and a demoniacal frenzy infuriated French and Russians, alike. Sir Robert Wilson, himself an eye-witness, gives a frightfully vivid picture of the scenes displayed. "The road followed by the French was strewed with guns, tumbrils, carriages, men, and horses, for no foraging parties could quit the high-road in search of provisions, and consequently the debility hourly increased." Thousands of horses soon lay groaning on the route, with great pieces of flesh cut off their necks and most fleshy parts by the passing soldiery for food; whilst thousands of naked wretches were wandering like spectres, who seemed to have no sight or sense, and who only kept reeling on till frost, famine, or the Cossack lance put an end to their power of motion."

8. All prisoners taken by the Cossacks were immediately and invariably stripped stark naked, and marched in columns in that state, or turned adrift to be the sport and the victims of the peasantry, who often would not let them even bring their sufferings to a merciful end by self-inflicted death. Sir Robert Wilson, in company with some Russian Generals, himself came across a crowd of peasant women, with sticks in their hands, hopping round a felled pine-tree, on each side of which lay about 60 naked prisoners, prostrate, but with their heads on the tree, which those furies were striking, in accompaniment to a national air or song, which they were yelling in concert. Several hundred armed peasants quietly looked on as guardians of the direful orgies. On another occasion they fell in with a column of 700 naked prisoners under a Cossack escort, the number

having been originally 1200, and having been constantly renewed from prisoners taken *en route*. Among this wretched convoy was a young French officer, who attracted, by his appearance, the attention of the Grand Duke Constantine, then serving on the staff of the Russian General Beningsen. The Grand Duke, who pitied him sincerely, asked him if he did not wish for death; and on the unfortunate young man stating "that if rescue was impossible, the sooner his ignominy and suffering were over the better," he was instructed to lie down, and the Russian Prince dismounted and actually killed him, before Sir Robert Wilson could obtain interference from the Russian General. The act was defended on the ground that no means existed to save the Frenchman, and if there had been such, no one dared to employ them. Famine soon drove the French soldiers to measures horrible to think of, including cannibalism, feeding even on the remains of their own burnt or frozen comrades. Sir Robert Wilson asked a grenadier of most soldierly appearance thus occupied, if this food was not loathsome to him? "Yes," he said, "it is; but I do not eat it to preserve life, that I have sought in vain to lose; but only to lull the gnawing agonies I suffer." On giving the grenadier a piece of food, which happened to be at command, he seized it with voracity, as if he would devour the whole; but suddenly checking himself, he appeared suffocating with emotion, looking at the bread, then at the donor, tears rolled down his cheeks; endeavouring to rise, and making an effort as if he would catch at the hand which administered to his want, he fell back and expired before he could be reached.

9. The cold had become intense, many men were frozen to death, and great numbers had their limbs, noses, and cheeks frozen. As the slaughter of the prisoners, prefaced with every imaginable mode of torture, by the peasantry still continued, in one case 50 having been actually buried alive, Sir Robert Wilson wrote to the Emperor Alexander to represent the horrors of these outrages, and to propose that they should be checked. The Emperor instantly sent an order prohibiting this conduct under pain of severe punishment, and offering a ducat in gold for every prisoner

delivered into safe custody. This order was beneficial, but did not prevent these outrages entirely. And so the dreadful record of revenge and crime, shaming our human nature, went on until the bitter end, many of the incidents and crimes occurring being indeed too horrible or disgusting for relation; as Sir Robert Wilson truly wrote: "It was a complication of misery, of cruelty, of desolation, and of disorder, that can never have been exceeded in the history of mankind.

10. On the 14th December, 1812, the central body of that mighty host, which had crossed the Niemen under the orders of Napoleon upon the 24th June, not six months before, numbered only 400 infantry and 600 cavalry; every other portion of this army being represented by a handful of officers and non-commissioned officers forming escort to the eagles that had not been captured or buried. Out of more than 800 guns only nine returned. Nor must it be supposed that the Russians, moving through a country devastated by the enemy, did not suffer. Want of food, fuel, and clothing, amid the rigours of a Russian winter, told its tale, and above 90,000 Russian soldiers perished in following the French retreat. Out of 10,000 recruits leaving Wilna as a reinforcement, only 1500 returned, and these mostly sick or mutilated by frost-bites.

11. The events and tragic ending of this celebrated campaign teach many military lessons; but that which it is wished to enforce here is the necessity for strict adherence to the Laws and Customs of War sanctioned by international usage and experience, if warfare is not to degenerate into a mere contest of wild beasts, degrading to human nature in its brutal ferocity. Let those who deprecate restraint being put on military measures for humane reasons, and plead that the victor is justified in taking any action effective to gain his end, ponder on the history of this campaign. Let them consider how much of the suffering and disaster endured by the troops of Napoleon may be traced to the outrages and excesses committed by them in their advance, conduct which was contrary to every recognized law of war, and brought a sure return of retaliation and revenge.

THE LAWS OR CUSTOM OF WAR.

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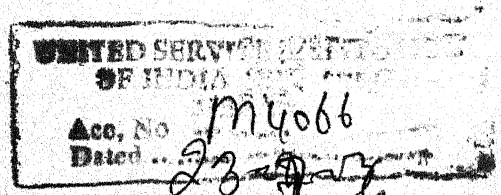
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